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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY
AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

v.

JOSEPH CAHILL
AND
ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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August 7, 1990

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QUESTION PRESENTED

Whether, as the New York Court of Appeals held, the First Amendment compels a state, whenever any ratepayer so demands, to exclude routine charitable contributions (to schools, local hospitals, libraries, homeless shelters and the like) from the ratebase of a publicly regulated but privately owned utility company.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the New York Public Service Commission and its individual members were also named in the caption of the decision below, but they made no appearance before the New York Court of Appeals. New York Telephone Company has no non-wholly owned subsidiaries and its parent company is the NYNEX Corporation. Rochester Gas and Electric Corporation has no parent company nor any non-wholly owned subsidiaries.

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The opinion of the Court of Appeals of the State of New York on the First Amendment issue is reported at 76 N.Y.2d 102 and is reprinted as Appendix A. The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, is reported at 147 A.D.2d 49 and is reprinted as Appendix B. The opinion of the Supreme Court of the State of New York, Albany County, is unreported but is reprinted as Appendix C. The earlier opinion of the Court of Appeals on the state action issue is reported at 69 N.Y.2d 265, 513 N.Y.S.2d 656, 506 N.E.2d 187, and is reprinted as Appendix D. The opinion of the Appellate Division, Third Department is reported at 113 A.D.2d 603, 498 N.Y.S.2d 499, and is reprinted as Appendix E. The opinion of the Supreme Court, Special Term — Albany County is reported at 128 Misc.2d 510, 490 N.Y.S.2d 90, and is reprinted as Appendix F.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

At least 22 states,[1] along with the federal government's own utility regulating authorities,[2] have deemed reasonable levels of appropriate charitable contributions to be ordinary business expenses that may be taken into account when setting a rate that the utility company's customers are charged for service. On the basis of their own statutes and utility regulations, a number of other states have, from time to time, disallowed inclusion

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[1] *See Re Southwestern Bell Tel. Co.*, 2 P.U.R.3d 1 (Ark. PSC 1953); *Re Mountain States Tel. & Tel. Co.*, 22 P.U.R.4th 516 (Colo. PUC 1977); *Application of Diamond State Tel.Co.*, 51 Del. 525 (1959); *Re Atlanta Gas & Light Co.*, 17 P.U.R.4th 421 (Ga. PUC 1976); *Re People's Gas, Light & Coke Co.*, 34 P.U.R.4th 292 (Ill. PUC 1979); *Re Northern Indiana PSC*, Cause No. 34920 (Ind. Sept. 27, 1977); *Re Iowa Power & Light Co.*, 6 P.U.R.4th 446 (Iowa PUC 1974); *Southwestern Bell Tel. Co.* v. *State Corp. Comm'n*, 192 Kan. 39 (1963); *Boston Gas* v. *Dept. Public Utilities*, 539 N.E.2d 1001, 1006 (Mass. 1989); *Detroit Edison Co.* v. *PSC*, 127 Mich.App.499 (1983); *Re Northwestern Bell Tel. Co.*, 37 P.U.R.4th 1 (Minn. PUC 1980); *Re Lincoln Tel. & Tel.*, 12 P.U.R.4th 79 (Neb. PUC 1975); *PSC* v. *State*, 102 N.H. 150 (1959); *N.J. Bell Tel. Co.* v. *Dept. of Public Utilities*, 12 N.J. 568 (1953); *Re New York Tel. Co.*, 84 P.U.R.3d 321 (N.Y. PSC 1970); *Northern States Power* v. *Bd. of Railroad Commissioners*, 71 N.D. 1 (1941); *Providence Gas Co.* v. *Burman*, 119 R.I. 78 (1977); *Re Dallas Power & Light Co.*, 6 Tex. PUC Bull. 720 (1981); *Re New England Tel. & Tel. Co.*, 13 P.U.R.4th 268 (Vt. PUC 1976); *Howell* v. *Chesapeake & Potomac Tel. Co.*, 215 Va. 549, *appeal dismissed*, 423 U.S. 805 (1975); *Re Huntington Water Corp.*, Case No. 8666 (W.Va. PUC July 8, 1977); *Re Mountain States Tel. Co.*, 37 P.U.R.3d 259 (Wyo. PUC 1959).

[2] *See In re Rules to Prescribe Components of Rate Base and Net Income*, 3 FCC Rcd 269, 280 (1987) ("reasonable charitable contributions are very much an obligation of a business enterprise to the community it serves and upon which it is dependent for its revenues" and are "part of the cost of doing business"); *Re El Paso Natural Gas Co.*, 90 P.U.R.3d 462, 473 (F.P.C. 1971).

of charitable contributions in rate-setting calculations.[3] The question here is whether the First Amendment *compels* a state to take the latter position, thereby mandating a major reversal in utility regulatory policy throughout the nation at both the state and federal levels.

In 1964 the New York legislature removed a statutory bar to the inclusion of charitable contributions in determination of telephone company service rates. N.Y.S. Laws of 1964, c. 734. In 1970, the New York Public Service Commission ("PSC"), whose "prime function . . . is to separate those costs which should be borne by ratepayers from those which are properly chargeable to shareholders," *Rochester Gas and Elec. Corp.* v. *PSC*, 51 N.Y.2d 823, 825 (1980), *appeal dismissed*, 450 U.S. 961 (1981), reconsidered its past practice of excluding charitable giving from the ratebase. The PSC found that "[c]orporations throughout the country have come to realize that charitable contributions are no longer wholly voluntary," and that the corporations, "recognizing their role in the communities in which they operate and their public interest obligations to those communities, have supplied charities with a large share of the funds needed to carry on their necessary community activities." Appendix pages A67-68 ("A67-68").

In reaching that conclusion, the PSC accepted the position of the Federal Power Commission:[4]

> We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations

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[3] *See e.g., Cleveland Elec. Illuminating Co.* v. *PUC of Ohio*, 69 Ohio 2d 258 (1982); *Jewell* v. *Wash. Utilities and Transp. Comm'n*, 90 Wash.2d 775 (1978); *Southern Bell Tel. & Tel. Co.* v. *Florida PSC*, 443 So.2d 92, 95 (Fla. 1983). State practice on the inclusion of charitable donations in a utility's ratebase is typically subject to policy shifts and reversals, like any other regulatory issue. *See, e.g., id.*

[4] The FPC was the predecessor to the contemporary Federal Energy Regulatory Commission ("FERC").

> have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business.

(A67).[5]

The PSC accepted petitioner New York Telephone Company's ("NYTel") contention that NYTel "and its employees benefit directly from the activities of the beneficiaries of its contributions and that it should be permitted to treat these expenditures as operating expenses for ratemaking purposes, as it does for Federal income tax purposes." (A66). Accordingly, the PSC ruled that "reasonable" amounts of charitable contributions were a "proper operating expense," but that, "if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely." (A68). The PSC does not select which organizations will receive contributions nor does it determine the amount of individual donations. (A43 & n.5).

Both New York law and PSC accounting regulations preclude the recovery in rates of any political, lobbying, or ideological expenditures.[6] Utility companies also have their own internal controls: for example, NYTel's regulations require that all recipients be qualified under § 501(c)(3) of the Internal Revenue Code and that, regardless of the entity's religious affiliation, if any, all recipients provide service regardless of race, gender, or religion. (JA 548).[7] The PSC puts

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[5] Quoting *United Gas Pipe Line Co.*, 31 FPC 1180, 1189 (1964).

[6] *See* NY Public Service Law § 114-a; PSC Uniform System of Accounts, Account 323.1 (any expense with "respect to the election or appointment of public officials, referenda, legislation or ordinances" or "for the purpose of influencing the decision of public officials or advancing the political objectives of the utility" must be separately accounted for and not reflected in rates).

[7] References styled in this manner are to the record contained in the Joint Appendix filed with the New York Court of Appeals.

a ceiling on the recovery of charitable giving by a utility company, allowing it to include in the ratebase only an amount equal to its charitable contributions prior to 1970 (when such donations were not part of the ratebase), adjusted for inflation. (A63; A68). Thus, for example, in one of the rate cases under attack here, NYTel's charitable giving in New York State totaled $4.5 million, of which only $2.1 million was included in the ratebase.[8]

The PSC reviews a utility's major rate request in a public hearing before it becomes effective. Comprehensive financial reports detailing all charitable giving are made available. Ratepayers are provided notice and an opportunity to participate, inquire, cross-examine and oppose the inclusion of any particular proposed operating expense, including individual charitable donations, in the ratebase. NY PSL § 92(2). Any objection to recovery of a contribution on the statutory ground that it is unreasonable, non-germane to company operations, or made in support of forbidden political, religious or ideological causes will be heard and resolved by the PSC. A ratepayer may appeal an adverse decision to the state courts.

Respondent Cahill did not avail himself of these procedures, instead choosing to file suit in a federal district court. That suit was dismissed for lack of jurisdiction. (A64). Cahill then filed suit in the New York courts against the PSC and NYTel, seeking an order annulling the PSC policy on charitable giving. (A64). Cahill "object[ed] as a matter of principle" to utility company contributions on "religious," "political" and "personal grounds" (A63), and "to being compelled to support . . . all charities in general." (A63). Cahill alleged that such donations violated his First Amendment rights no matter what the purpose of the contribution or how small a margin these expen-

[8]The interstate portion of NYTel's charitable contributions, like its interstate telephone operations, is regulated by the Federal Communications Commission, which, like New York, deems reasonable contributions to be an ordinary operating expense. See note 2, *supra*.

ditures added to his monthly utility bill. (A63). The Attorney General of New York brought a proceeding against the PSC and Rochester Gas and Electric Corporation ("RG&E") seeking the same relief. The two matters were consolidated. (A3).[9]

NYTel moved to dismiss on the ground that the state involvement alleged was not the type of "state action" that could support a claim under the First Amendment. The motion was denied and a divided New York Court of Appeals affirmed. See Appendix D. The majority below based its state action analysis on this Court's decision in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), where the issue was barely discussed and hardly in doubt (since government employment was involved), and dismissed salient state action precedents such as *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), as "inapplicable." (A34). NYTel's petition to this Court for a writ of certiorari was opposed by Cahill on the ground, among others, that the state court proceedings were not complete since the state courts had only denied NYTel's motion to dismiss. Cahill contended that "there very likely will be opportunity for this Court to review all of the issues in this case once the record is complete and the legal questions raised by the complaint have been fully considered in the lower courts. Until then, the petition for certiorari should be denied." Respondent's Brief in Opposition in No. 86-2043 at 18. This Court denied the writ, 108 S.Ct. 100 (1987), and the case proceeded to a hearing on the merits.

At trial, NYTel submitted uncontroverted affidavits from company officers and various experts attesting to the fact that charitable contributions are routinely considered a cost of doing

[9] New York Attorney General Robert Abrams' challenge to the recovery by RG&E of charitable contributions was made subsequent to and in a proceeding separate from that of NYTel. Although references throughout this petition are to the record compiled with respect to NYTel, the issues raised herein apply equally to both petitioners.

business in corporate America and a civic obligation. The affidavits also established the direct relationship between the business of utilities and their charitable contributions. These affidavits demonstrated how NYTel, along with other corporations, uses charitable contributions to improve its local business climate for the purpose of attracting and keeping customers in New York, to ensure the availability of medical, educational and other community services needed by its 50,000 employees, and to ensure the existence of a large pool of educationally qualified applicants for company positions. (JA 555-69). The affidavits further established that NYTel does not engage in political, religious or ideological giving. (JA 547). Because they were unchallenged, the statements in these affidavits were deemed admitted and accepted as true pursuant to New York law.[10] Respondent Cahill did not put on *any* evidence disputing the direct benefit received by utilities in their day-to-day operations from their contributions to educational, civic, cultural, welfare and health organizations. Nor did Cahill dispute the fact that the contributions were not made for political, religious or ideological purposes.

The trial court stated that there was no dispute over the material facts. (A25). Relying on this Court's decision in *Abood*, the court held that, simply by *allowing* a utility to include a portion of its charitable contributions in the ratebase, the PSC violated the First Amendment rights of ratepayers. (A25-26). The Third Department of the Appellate Division, noting that "there was no disagreement among the parties as to facts which were material and relevant" (A18), affirmed, again relying on *Abood*. (A18-20).[11]

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[10] NY Civil Practice Law and Rules § 7804(d); *Hines* v. *LaGuardia*, 293 N.Y. 207, 216 (1944).

[11] The PSC declined to appeal further and, without changing its view that a reasonable amount of appropriate charitable contributions is a legitimate cost of doing business, required utilities to defer reflecting the previously allowable contributions in their rates, pending a final outcome in this litigation. PSC Order Requiring Deferral of Revenues, Case 29119 (Sept. 25, 1989).

The New York Court of Appeals affirmed, announcing a sweeping new First Amendment principle:

> The essence of the First Amendment impingement, as we have come to understand its modern nuanced application, is that the ratepayers are entitled to protection against forced financial support for causes and messages personally distasteful to them, because that would render those individuals faithless to their own beliefs.

(A6). Relying on *Abood*, the majority opinion declared a constitutional right to be protected by the state from having to support financially, even indirectly and incidentally, any expressive act with which one disagrees. While noting that the right at issue in *Abood* was concerned with compelled "association with groups which advance beliefs contrary to [one's] own" (A3), the Court of Appeals brushed aside the element of association or public identification that this Court deemed pivotal in *Abood* and related cases. The court held it irrelevant that "ratepayers will never be personally identified with the ideological positions expressed through the charitable donations and entities selected by the utilities." (A5-6). It was enough that rate payments included a miniscule recoupment of charitable contributions that, supposedly, "could reasonably be regarded by the individual ratepayer as an affirmation of or an acquiescence in beliefs" he does not hold. (A6).

The court below thus expressly "extend[ed]" *Abood* beyond its associational moorings (A7) and demanded that charitable contributions be "germane to the reasonable cost of doing business and to the provision of utility services" (A7) while, importantly, making it plain that it considered this test equivalent to a showing of a compelling interest. (A7-8).

Applying this standard, the court held that "the nexus between the coerced recoupment of contributions and the provision of the utility services is too tenuous." (A8). Without ever mentioning the contrary findings of the PSC, the FPC, and the FCC, the court below derided the salutary business impact of corporate charity as "gossamer civic good will" and "corporate public relations [that] . . . advances predominately [*sic*] the private interests of the utility corporations and their shareholders — especially their financial interests" (A9).[12]

The court seems to have implicitly recognized that its new First Amendment doctrine lacks a limiting principle, for it noted that, under its reformulation of *Abood*, even "forced" subsidies via government taxation to expression that some taxpayers would find "highly offensive" are "troublesome." (A9). Nonetheless, the court settled for the distinction that even if government can compel taxpayers to subsidize the programs of the state and the private charitable contributions of other taxpayers, it cannot allow utilities to require ratepayers to share the utilities' entire cost of doing business when that cost includes reasonable donations to charity. (A9).

The concurring opinion completely rejected the majority's reasoning: "The threshold constitutional problem that existed in *Abood* is not present in this case. . . . [I]t does not violate any associational or expressional rights to compel an individual to pay for the services he has obtained from a utility company." (A11). *Abood* and related cases are simply inapposite because in this case there is "no implicit association of the ratepayer with the utility company by virtue of the former's payment of his utility bills." (A12).

As to the broader assertion of the majority about the unconstitutionality of ever compelling someone indirectly to share

[12] Nor did the court mention that, to the extent the financial interests of utilities are improved, these financial benefits are passed along to ratepayers in the very ratemaking proceedings in question.

the cost of expression with which he disagrees, particularly when doing so would supposedly "convert the free marketplace of ideas to the consumer-subsidized preserve of corporate utility ideas" (A10), the concurring opinion stated that "the majority's hyperbole proves too much." (A13). The "observation that such a compulsion is 'sinful and tyrranical' is simply too facile" (A12) (quoting the majority opinion at A5):

> Our entire system of government by majority rule is built on the notion that individual citizens may be compelled to pay for . . . causes and ideas that offend their own personal principles. . . . "[F]orced 'support' of distasteful causes is an inevitable concommitant of living in an organized society" . . . .

(A12).

The concurring opinion concluded that "there can be no serious constitutional objection to a governmental policy that delegates to a private concern the power to select the causes that will receive subsidies derived, directly or indirectly, from citizens' pockets, provided, of course, that the policy is a content-neutral one." (A13). Nevertheless, it found a constitutional flaw in "the state's delegation of its power to impose a tax, as distinguished from its power to spend the taxed funds." (A14). The concurrence apparently overlooked the facts that (1) the PSC restrains rather than empowers utilities, and that (2) utility rates are in fact set by the PSC pursuant to carefully delineated government accounting policies. Finally, without even purporting to show a transgression of due process limits on standardless delegation of government power, the concurring opinion concluded that the PSC policy had to be annulled because it gave private utilities the power to decide "whether and how much to 'tax' " ratepayers, thereby violating "the 'no taxation without representation' principle." (A14). No authority whatsoever was cited for this proposition.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals has held that a state's policy of allowing utilities to include all of their ordinary business expenses — including reasonable charitable contributions — in their ratebase is, in itself, a violation of the First Amendment. This holding creates a revolutionary new federal "right" that hands each individual ratepayer of every utility and regulated monopoly in the nation a mechanism for invoking the Federal Constitution to second-guess the utilities' government-authorized business policies and rate schedules. Certiorari should be granted because this departure from federal precedents has alarming national implications.

There are no facts in dispute. Indeed, respondent Cahill declined to put on *any* evidence at trial. The factual record consists entirely of the PSC's findings about corporate charitable giving and of petitioner NYTel's uncontroverted affidavits about its own practices. The issue of law presented here is therefore stark and clear. There can be little doubt that the court below has placed itself in irreconcilable conflict with this Court's doctrines regarding the outer boundaries of "state action" and the furthest reaches of the First Amendment.

1. First, as to state action, it is settled that the mere failure of a state to disallow a private action — or the mere authorization of such action by a state in the course of its regulatory process — does not automatically make the state responsible for the impact of that private action as though the action were one that the state had itself taken, commanded or deliberately encouraged. "Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-05 (1982). *See also Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164-65 (1978). With respect to publicly regulated utility companies, this Court has specifically held:

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).[13]

Yet the New York Court of Appeals completely discarded these principles when it found the requisite "state action" in the mere regulatory approval of a proposed telephone tariff and treated this Court's decision in *Abood* as having silently superseded this entire series of state action decisions. According to the court below, *Abood* — which had no occasion to expand state action doctrine, since the presence of government employment made the resolution of that issue obvious — *sub silentio* established a constitutional equation between a state policy of *permitting* the private inclusion of certain costs in a company's rates, and a state policy *requiring* such costs to be passed on to ratepayers. But mere regulatory acquiescence in a telephone company's business decisions has expressly been held, by the only Courts of Appeals to consider the matter, *not* to constitute "state action" of a sort that would make a public service commission accountable for any alleged First

[13] Although there has been disagreement over the application of these general principles to the facts of particular cases, there is a consensus on the correctness of the principles themselves. *See, e.g., Yaretsky*, 457 U.S. at 1013-14 (Brennan, J., dissenting).

Amendment abridgement entailed by that business decision. *Carlin Communication, Inc.* v. *Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357-59, 1361 (11th Cir. 1986); *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1586 (1988).

Because there is no dispute that corporations routinely make charitable contributions and treat them as a normal cost of doing business, the PSC's mere approval of NYTel's proposed tariff did not "authorize[ ]" NYTel "to do anything that it could not [or would not] have done as a private business." *Southern Bell Tel. & Tel.*, 802 F.2d at 1361. There was thus no state action of the kind that would make the State of New York responsible for NYTel's decision to include some charitable donations in its calculation of telephone rates. *Cf. Flagg Bros.*, 436 U.S. at 162 n.12 (state statute that merely authorized what defendant would tend to do in absence of authorization, and that was not a significant departure from traditional private arrangements, did not make state responsible for defendant's authorized conduct) (cited in *Carlin*, 802 F.2d at 1361).[14]

But even if New York's ratemaking policy were subject to respondents' constitutional challenge, that policy simply does not violate the First Amendment; the decision below holding otherwise sets a dangerous precedent that must be reversed.

2. It is the policy of the State of New York that ratepayers of NYTel, RG&E and the state's other utilities may be charged

[14] Making the violation of *Jackson* and its progeny all the more egregious, the New York Court of Appeals chose to ignore the awkward but indisputable fact that New York's regulatory activity here actually *protected* the state's ratepayers from a larger phone bill. In the absence of state regulation, NYTel would be free, as all companies are in a free market, to make a profit after reflecting *all* of its operating expenses in its price structure. The PSC approved far less than the rate sought by NYTel and, with respect to charitable contributions in particular, allowed NYTel to include in its rate base less than half of the charitable contributions it actually made.

a service rate equal to all the normal costs of doing business plus a fair return on equity. Utilities donate money to charity to improve schools, to enhance local medical facilities, to furnish necessary community welfare services and to enrich cultural offerings. Such contributions do *not* pay for lobbying, political advertising or campaigning, expenditures which concerned this Court in *Abood* and its progeny, nor do they support the dissemination of religious beliefs. Donations for those purposes may not, according to PSC accounting rules and petitioners' own internal guidelines, be counted as operating expenses when setting the service rate that customers will be charged.

This distinction comports with longstanding state and federal utility accounting practice. For example, political advertising is a "below the line" expense, not a proper income deduction, and hence is chargeable to shareholders rather than ratepayers.[15] In contrast, regular commercial advertising is a routine, "above the line" cost of doing business and therefore chargeable as part of the cost of service. Thus corporations, whether publicly regulated utilities or regular private enterprises, routinely treat as business expenses and therefore pass along to their consumers the costs of a wide range of quintessentially expressive conduct protected by the First Amendment: commercial advertising; business communications with employees, suppliers, and regulatory agencies; and litigation.

Similarly routine is the treatment of charitable contributions as legitimate business expenses, deductible from income under both state and federal tax law;[16] the FCC and the FERC, as well as numerous state public utility commissions throughout

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[15] *See, e.g., Alabama Power Co.*, 24 FPC 278, 286 (1960), *aff'd sub nom., Southwestern Electric Power* v. *FPC*, 304 F.2d 29 (5th Cir. 1962); NY PSL § 114-a. As it happens, NYTel engages in no political advertising at all.

[16] IRC §§ 170(a), (c) and 501(C)(3) & (C)(4); New York Tax Law §§ 208.9, 615.

the nation, have all allowed charitable contributions to be included in the cost of service and charged to ratepayers.[17]

The PSC in particular has determined that the interests of efficient operation and fairness to utilities require that reasonable charitable contributions be included in the ratebase. (A34-35). And this Court has held that New York's "concern that rates be fair and efficient represents a clear and substantial governmental interest." *Central Hudson Gas & Elec. Co.* v. *PSC*, 447 U.S. 557, 569 (1980). Expenses that the state has determined to be reasonably related to utility operations may therefore be charged to ratepayers even if those costs incidentally have an expressive, albeit non-political, element that implicates the First Amendment. Even in *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), where the compulsion to join and support a union involved an element of coerced public association absent here, this Court held that "expenditures . . . necessarily or reasonably incurred" in non-political union activities could be passed along to dues-payers:

> [O]bjecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the *expenses of activities and undertakings normally or reasonably employed* to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448 (emphasis added).

Under New York's policy, utility ratepayers are guaranteed that rates will not be set above reasonable costs plus a reasonable profit; in return, utilities may charge ratepayers the *full*

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[17] *See* notes 1 and 2, *supra*.

costs of the services from which they benefit. This neutral ratemaking policy was developed for legitimate reasons wholly unrelated to suppressing or advancing any point of view.

3. Where, as here, the government has instituted a neutral policy of general application completely unrelated to the suppression of speech, it must be free to implement that policy uniformly — even over the sympathetic claim of an individual that the policy has an indirect, incidental impact on values protected by the First Amendment. If the state had to make exceptions to all its general policies in order to accommodate such objections — or even had to take time to consider all such objections — the machinery of government would grind to a halt.

There can be no dispute that the policy of including all reasonable costs in the calculation of utility rates is facially neutral with respect to the First Amendment rights asserted by respondents. Neither the court below nor respondents have even attempted to show that the PSC's policy was calculated to do anything other than allow recovery of all expenditures reasonably related to utility operations, including routine charitable contributions related to that end, let alone to demonstrate that the policy was "in reality a facade for viewpoint-based discrimination" by the government. *Cornelius* v. *NAACP Legal Defense & Education Fund*, 473 U.S. 788, 811 (1985).

Such a neutral policy is not made constitutionally vulnerable merely by its indirect and incidental impact on free expression. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705-06 (1986); *id.* at 708 (O'Connor, J., joined by Stevens, J., concurring).[18]

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[18] Even where the effect of government land use policy, for example, would "'virtually destroy [a group's] ability to practice [its] religion,' . . . the Constitution simply does not provide a principle that could justify upholding . . . legal claims" against the policy unless it actually "prohibit[s] the free exercise of religion." *Lyng* v. *Northwestern Indian Cemetery Protective Ass'n*, 108 S.Ct. 1319, 1326-27 (1988). If this is so with respect to even the most constitutionally sensitive religious claims, *a fortiori* it is true for other First Amendment claims.

Assuming *arguendo* that a state may exclude utilities' charitable contributions from the ratebase, as several states have, it remains clear, as this Court unanimously concluded earlier this year in *Jimmy Swaggart Ministries* v. *Bd. of Equalization*, 110 S.Ct. 688 (1990), that the First Amendment "does not *require* the State to grant [the complainant] an exemption from its generally applicable" rules and policies. *Id.* at 697 (emphasis in original). If the contrary view becomes the law, the resulting tide of constitutional challenges will swamp both government regulators and the courts.

4. Nor is there any defensible basis in precedent for the First Amendment "right" pioneered by the court below. That right supposedly "springs from [the ratepayer's] personal sense of real and perceived compulsion under the PSC policy effecting his contribution to and association with groups which advance beliefs contrary to his own and which are selected unilaterally and unrestrictedly by the utilities." (A3). After reviewing this Court's decisions in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943), *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *Abood*, the New York Court of Appeals stated that the key question is whether inclusion of a utility's charitable contributions as operating expenses in the PSC's rate calculations "could reasonably be regarded by the individual ratepayer as an affirmation of or acquiescence in beliefs of the benefitted organizations, some of which beliefs happen to be anathema to the objecting ratepayer." (A5-6). Although the Court of Appeals recognized that the right vindicated in those

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The "First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the . . . exercise" of their First Amendment liberties. *Id.* at 1327. Here, even if some impact on the values invoked by respondents were conceded, it remains the case that the PSC's neutral regulatory policy of allowing *all* ratepayers to be charged for *all* routine and reasonable utility operating costs "is no different from other generally applicable laws and regulations — such as health and safety regulations — to which [all] must adhere." *Jimmy Swaggart Ministries* v. *Bd. of Equalization*, 110 S.Ct. 688, 697 (1990).

cases was freedom from coerced "association" (A3) with ideas or opinions one rejects, the court casually extended that right to this case, curiously deeming it utterly irrelevant that "ratepayers will never be personally identified with the ideological positions expressed through the charitable donations and entities selected by the utilities." (A5-6). "It is enough," we are told, "that the extracted payments impose on the ratepayers . . . particular and objectionable expressions and causes of a host of organizations." (A6).

The court below completely misapprehended this Court's First Amendment jurisprudence. For it blithely discarded the element of coerced association or identification with ideas that animated the very cases on which it relies.

Barnette vindicated the principle that government cannot literally put words in someone else's mouth by forcing him to recite the pledge of allegiance. *Wooley* stands for the proposition that an individual may not be forced "as a part of his daily life . . . to be an instrument for *fostering public adherence* to an ideological point of view he finds unacceptable," 430 U.S. at 715 (emphasis added), nor "forced in his daily life to *identify* with particular views," *FCC* v. *League of Women Voters*, 468 U.S. 364, 385 n.16 (1984) (emphasis added).

Similarly, *Railway Employees* v. *Hanson*, 351 U.S. 225 (1956), which was this Court's starting point in *Abood*, 431 U.S. at 217, dealt with the limits of coerced "ideological and political *association*." 351 U.S. at 236 (emphasis added). And the constitutional right safeguarded in *Abood* and its progeny was the individual's "freedom to *associate* for the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood*, 431 U.S. at 222 (emphasis added). *See also id.* at 233 & n.9, 235; *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 301, 302 n.9 (1986). That right was implicated in those cases because workers were required to fund political speech by a union that the law conclusively deemed to be their "exclusive

representative." *Ellis*, 466 U.S. at 448. *See also Keller* v. *State Bar of California*, 110 S.Ct. 2228, 2236 (1990) (quoting *Ellis*). Thus, the claim labelled "meritorious" by this Court in *Abood* was that the non-union-members "have been prohibited, not from actively associating, but rather from refusing to associate." 431 U.S. at 234.

The core of the constitutional concern in these cases, as this Court recently recognized in its unanimous opinion in *Keller* v. *State Bar*, was "*compelled association*," 110 S.Ct. at 2236 (emphasis added), with an organization and its views. Obviously, no ratepayer of NYTel, RG&E, or any other utility can demonstrate that, through the payment of his utility bills, he becomes associated, identified, or otherwise "tagged" with whatever value judgments or expressive sentiments might inhere in the utilities' charitable contributions. Indeed, neither respondent made any attempt to establish such association and respondent Cahill's verified petition, which began this litigation, virtually concedes the impossibility of actual association when it admits that even Cahill himself could not identify the charities receiving NYTel contributions. (A63-64). Clearly, then, no one else would associate Cahill with those contributions.[19]

Yet when the court below confronted this doctrinal obstacle to invoking *Abood* in this context, it simply jettisoned the requirement of coercive association. (A6). This alteration of prevailing doctrine does not, as the Court of Appeals would have it, merely "extend the First Amendment canopy" recognized in *Abood* (A7) — it creates from whole cloth a new "canopy" altogether. The court below has stitched together an

[19] In *Bd. of Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926), this Court observed that "customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company." *See also Pacific Gas & Electric Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 22 n.1 (1986) (Marshall, J., concurring in the judgment).

associational right in which the element of association is irrelevant, a right against being compelled to identify with another's message where there is no possibility of such identification.

The principle upheld in *Wooley* and elaborated in *Abood*, 431 U.S. at 231-32 & n.28 (relying on *Wooley*), is *not* that citizens must be spared all indirect costs stemming from the speech of others, but that an individual may not be forced by the state to display, or otherwise personally associate himself with, a specific message. This Court struck down New Hampshire's ban on covering up the state motto on license plates, and thus allowed Maynard to tape over the slogan to which he objected, because "an automobile . . . is readily associated with its operator." *Wooley*, 430 U.S. at 717 n.15. But no perceptible association resulted from Maynard's being compelled to help pay for printing the offending motto on license plates in the first place. Accordingly, *no* Justice doubted the state's power to require all citizens to pay the full license fees, even though part of such fees went to pay for imprinting the plates with the motto that some drivers did not endorse. *See* 430 U.S. at 721 (Rehnquist, J., dissenting).[20]

Not even the meagre burden of disassociation constitutionally imposed on Maynard — the hassle of masking the state motto on his license plate with a piece of tape — is at issue here. For no one in her right mind would confuse the full

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[20] Similarly, in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the question was whether the free speech rights of owners of private shopping centers were violated by a state requirement that those owners tolerate the expressive activities of those who came upon the shopping center premises. In concluding that there was little risk that the views of speakers and petitioners would be attributed to the owners, this Court noted that owners could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand . . . disclaim[ing] any sponsorship of the message . . . ." *Id.* at 87. Again, there was *no* suggestion that the resulting financial burden of posting signs to affirmatively disassociate oneself with another's ideas posed any First Amendment problem at all.

payment of one's telephone bill with endorsement of whatever ideological or social messages might lurk in the phone company's charitable contributions to the Girl Scouts, local libraries, and the Red Cross. With respect to the First Amendment, then, just as with state action, *supra* at 12, the court below transformed *Abood* into a veritable engine of destruction for garden variety state social and economic policies.

5. The implications of the decision below for the nation's utilities and for state and federal utility regulation are truly staggering. The State of New York, through its legislature and its Public Service Commission, has determined that the social, economic and community environment in which utilities function is enhanced by reasonable levels of charitable contributions, that reasonable levels of such contributions are as much a responsibility of utilities as they are of other corporations, and that such donations therefore constitute a legitimate operating expense for those utilities choosing to make them. (A67-68). New York has accordingly allowed utilities such as petitioners to reflect a portion of their contributions in their PSC-approved rate structure as a cost of doing business.

The New York courts have now invoked the First Amendment to override this legislative and executive judgment. As those courts would have it, the First Amendment affirmatively mandates state action to exclude charitable contributions from a utility's ratebase. It is not enough that, as the court below conceded, utilities' charitable giving "benefit[s] in many intangible ways the utilities' employees [and] customers" (A8-9), for there is, according to the Appellate Division, "[n]o *necessary* relationship between providing utility service and making charitable donations." (A20-21) (emphasis added). If contributions do not directly and immediately enhance "the *service* interests of the ratepayers" (A9) (original emphasis), then they are insufficiently "germane to the reasonable cost of doing business" (A7), and permitting their inclusion violates the First Amendment.

Although the New York PSC, the FCC and the FERC have all concluded that charitable contributions by utilities benefit the communities they serve and constitute a legitimate operating expense, the court below took it upon itself to brush those findings aside and to deride the benefits as "gossamer civic good will." (A9). The Court of Appeals went so far as to hint that such corporate donations — to theatre groups, the Salvation Army, the United Way, shelters for the homeless and the like — are not really philanthropy at all, but some cynical campaign that "essentially advances predominately [*sic*] the private interests of the utility corporations and their shareholders — especially their financial interests . . . ." (A9). Suffice it to say that state and federal regulatory bodies alike have found that such donations advance the interests of petitioners' employees, customers and operations. Indeed, to whatever extent contributions by utilities advance "their financial interests," the financial benefits are in turn passed along to ratepayers in the PSC's ratemaking proceedings.

In any event, it is not the business of courts to invoke the First Amendment as a ground for second-guessing the socioeconomic policies chosen by the legislative and executive branches. The assertion of the court below that excluding charitable contributions from the ratebase would not threaten the economic viability of utilities or their delivery of services is beside the point:

> The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the *particular* case will not threaten important government interests. . . . Regulations that burden speech incidentally . . . must be evaluated in terms of their *general effect*. Nor are such regula-

> tions invalid simply because there is some imaginable alternative that might be less burdensome on speech.

United States v. *Albertini*, 472 U.S. 675, 688-89 (1985) (emphasis added).

That the value of utilities' charitable giving and of the state and federal policies promoting it may be "intangible" (A8) or impossible to quantify does not relegate such policies to constitutional limbo. As this Court noted in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61 (1973), intangible benefits and other "unprovable assumptions . . . underlie much lawful state regulation of commercial and business affairs."[21] Without even blinking, the court below rolled right past this basic limit on its discretion to invoke the Federal Constitution to annul state regulatory policy. The considered opinion of the New York legislature and the PSC notwithstanding, the new First Amendment standard for utility rate-setting is this: the Constitution bars including charitable contributions as operating costs if even a single ratepayer objects to any of his utility bill going to matters for which he would not voluntarily spend money, and in which he does not believe, if those matters are not demonstrably indispensable to the bare provision of utility service in the near-term future. In applying this test, the Appellate Division below volunteered its impression that "the abolition of the present policy would not be *disastrous*." (A21) (emphasis added).

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[21] In rejecting an argument that a stated public purpose was too speculative to pass constitutional muster in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 242-43 (1984), this Court explained: "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of . . . socioeconomic legislation . . . are not to be carried out in the federal courts." *Accord Berman* v. *Parker*, 348 U.S. 26, 32 (1954); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984). The fact that the forbidden second-guessing here was undertaken by a state court invoking the Federal Constitution rather than by a federal court makes no difference. *See Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 459, 461-62 n.6 (1981).

Adoption of this standard could easily provoke an epidemic of judicial meddling in utility rate-setting, for it admits of no principle that could confine it to charitable contributions. The New York courts have implicitly and erroneously assumed that such contributions are somehow a special type of expenditure, that they have a unique expressive quality unknown to other business expenditures made by utilities. That is patently false. If the First Amendment compels every state to disallow *all* utility charitable contributions because *some* of them may have an expressive element with which even a single ratepayer disagrees — or more precisely, because the ratepayer would have spent the money differently or not at all — then all *other* utility expenditures or decisions that affect the rate calculation, that are not strictly indispensable to furnishing service, and that may likewise have an expressive quality must *also* be subject to judicial examination and override on constitutional grounds.

For example, a utility's employee health plan could not include abortions (a procedure hardly "indispensable" to the provision of telephone service or electrical power) because many ratepayers — such as respondent Cahill (A30) — would disagree with that use of money.[22] Yet paying for prenatal care and childbirth is more costly to a health plan and ultimately to ratepayers, and funding birth but *not* abortion might strike *other* ratepayers as ideological. So too, a decision to include paternity leave in the employee benefits plan would marginally increase operating costs and might offend ratepayers who believe that raising children is women's work; while such a leave

[22] One of Cahill's objections in his petition was to charitable donations that he sees as indirectly supporting abortion by, for example, contributing to a cancer ward in a hospital where abortions may be performed. Brief for Cahill in the Court of Appeals at 5. Cahill virtually concedes that, under the ruling he won below, an employee medical plan that subsidized abortion would be subject to First Amendment attack unless the courts first determined that there were compelling reasons for giving utility management discretion in spending money to promote its employees' welfare. *Id.* at 39 n.*.

policy might be deemed progressive and equitable by some, foregoing it could not be deemed "disastrous" to utility service — the standard applied below. A utility could not comply with the Sullivan Principles on investment in South Africa, or refuse to do business with firms in Romania, Iraq or Communist China out of an aversion to perceived human rights abuses, without running the risk of some ratepayer objecting that these value-laden decisions were denying the company the cheapest parts and services and thereby costing the ratepayers money. Voluntary improvements for wheel-chair and handicapped access to company facilities, beyond those required by the Americans with Disabilities Act of 1990, might strike able-bodied and self-reliant ratepayers as a luxury that public utilities cannot indulge at others' expense.

In short, leaving in place the standard adopted below would invite ratepayers to invoke the Constitution to challenge countless discretionary utility expenditures that, like charitable contributions, have some expressive element even though they are made in the routine course of business. Such constitutional challenges would invariably consume enormous judicial resources. The decision below, unless reversed, thus threatens to inaugurate under the First Amendment a new age of substantive judicial review of state business and economic regulation with respect to utilities that could rival the excesses of substantive due process during the *Lochner* era.

6. Utilities can't operate this way; neither can government. Indeed, the danger inherent in the First Amendment principle unleashed below cannot plausibly be confined to the context of utility rate-setting. The New York Court of Appeals' flat rule that any compulsory financial support for any expression-related activity of others " 'is sinful and tyrranical' " (A5) has *no limiting principle capable of distinguishing meaningfully between ratepayers and taxpayers.*

As this Court recently noted in *Lyng* v. *Northwestern Indian Cemetery Protective Ass'n*, 108 S.Ct. 1319, 1327 (1988), government simply could not function in a reasonable manner if diverse objections by various individuals to public operations that are rational and neutral on their face had to be entertained, much less accommodated. That is why tax policies encouraging charitable contributions by private corporations and individuals require no special First Amendment justification, even though they indisputably have the incidental effect of shifting a tax burden to other taxpayers who might not themselves choose to make these contributions and who might object to them on religious or ideological grounds. This Court has consistently held that taxpayers simply have no First Amendment right to object to the use of tax revenue or tax deductible funds (tax subsidies) "to promote private views with which taxpayers may disagree." *FCC* v. *League of Women Voters*, 468 U.S. at 385 n.16; *Buckley* v. *Valeo*, 424 U.S. 1, 90-93 (1976) (per curiam).

To its credit, the court below recognized that its new First Amendment principle could be seen as casting doubt on the permissibility of using tax dollars or deductions to fund programs or speech "highly offensive to some citizens" (A9); it even offered the amazing observation that such coercive tax subsidies are "troublesome and controversial . . . in their fiscal and policy implications"! (A9). The only distinction between ratepayers and taxpayers that the Court of Appeals ventured was this: the government's discretion to spend tax money and to allocate tax subsidies without examining the impact on the First Amendment rights of taxpayers "cannot form a constitutional predicate for the government to go the next gigantic step and delegate this unique power to publicly regulated enterprises, especially corporate utility monopolies, and to allow them to extract across-the-board ratepayer subsidies." (A9).

This makes no sense. If any and all incidental, compelled financial support for another's views indeed violates the First Amendment, then it cannot be *more* offensive to the Constitution for that compulsion to be placed in the hands of a private party rather than left to the government, for the First Amendment, like the rest of the Bill of Rights, is a shield against *government* abuse of power. In any event, it would be the government that decided to entrust the power in question, subject to government guidelines and review, to private institutions. The reason that compelled taxpayer and ratepayer "subsidies" alike do *not* violate the First Amendment is that there is no association or identification with the ideas to which one objects. A utility ratepayer is no more forced to stand up and be counted as a supporter of Catholicism by reason of a utility contribution to a Church soup kitchen than a taxpayer is compelled to affirm whatever views the National Endowment for the Arts might express on the subject of homoerotic art each time it decides whether or not to fund another Mapplethorpe exhibit. Nor is a taxpayer somehow tarred with the "stigma" of supporting Zionism because some other individual made a tax-deductible contribution to the United Jewish Appeal.

The Court of Appeals' "delegation" principle is, in truth, a hopeless throwback to the heyday of substantive due process and is wholly incapable of distinguishing taxpayers from ratepayers. The New York legislature has no more "delegated" to the utility companies the power to donate ratepayers' money to charitable causes of the utilities' choosing by allowing some donations to be included as proper business expenses, than it has "delegated" to those same companies the power to donate part of *every* New York taxpayer's money by allowing the utilities — like all other corporate and individual taxpayers — to deduct their contributions from income before paying their taxes. In this respect the *governmental involvement* in each case is identical: legislative enactment of a flat, neutral rule

— on the one hand, "all reasonable costs of business are included in the utility billing rate," on the other, "all charitable contributions are deductible." And the *impact on protesting citizens* is also the same, with the qualification that citizens pay out a lot more in increased tax burdens shifted by other people's charitable tax deductions than they do in increased utility bills that contain a few pennies of recouped corporate donations. The only thing that is really different is the degree (and the source) of compulsion: using a telephone or an electrical appliance is not quite as inevitable as death and taxes.

7. The rule established below would also play havoc with revenue measures that fall in between utility bills and general income taxes. For example, pursuant to a recently enacted law, California has been running anti-smoking advertisements funded by a special tax on cigarettes. Such a tax obviously coerces payment from those least likely to support the subsidized speech. The same might be said of a state tax imposed on gas-guzzling automobiles to pay for a campaign to lower the national speed limit to 55 m.p.h. and to mandate improved fuel efficiency in American cars. Purchasing gasoline is almost as great a compulsion in modern life as paying for electrical and telephone service. In an era in which "sin taxes" and other targeted forms of "revenue enhancement" are becoming the preferred budget-balancing strategies of fiscally strapped governments, the First Amendment rule announced below is particularly threatening.

CONCLUSION

The decision below leaves utility regulation in disarray. NYTel is subject to both state and federal regulation: the court below has held that the First Amendment forbids the inclusion of routine charitable contributions in NYTel's ratebase for

intrastate telephone service, while the FCC, which regulates NYTel's interstate service and rates, allows such donations to be counted as an operating cost. The decision below therefore affects not only the multitude of utility companies in New York State, but those in every jurisdiction, for challenges similar to this one can now be expected to the federal ratemaking policies of the FCC and FERC, as well as to the policies of public service commissions throughout the nation.

This Court noted probable jurisdiction in *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530 (1980), and *Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557 (1980), where the New York Court of Appeals had rejected First Amendment arguments advanced by New York utility companies. The Court of Appeals' dubious extension of First Amendment arguments against those same companies is at least as worthy of this Court's plenary attention, not least because the impact on state and federal regulatory and tax regimes is even greater here than it was in either of those cases. Certiorari should therefore be granted.

Respectfully submitted,

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August 7, 1990

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APPENDIX A.

State of New York Court of Appeals

No. 110

In the Matter of Joseph Cahill,
Respondent,
and Robert Abrams, as Attorney General of the State of New York,
Respondent,

v.

Public Service Commission, et al.,
Respondents,

OPINION
This opinion is uncorrected and subject to revision before publication in the New York Reports.

New York Telephone Company, and Rochester Gas and Electric Corporation,
Appellants.

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Stanley W. Widger, Jr., Jeffrey C. Parnell, Rochester, for appellant Rochester Gas & Electric.

Richard D. Emery, Mark A. Sirota, Paul Neuborne, NY City, for respondent Cahill.

Robert Abrams, Attorney General (Richard W. Golden of counsel) respondent *pro se*.

David S. Smith, National Fuel Gas; Josephine S. Trubek, Rochester Telephone; F. Peter O'Hara, Peter M. Metzger, Brooklyn Union Gas; Peter Garam, Elizabeth S. Harding, Larry Carbone, Con Ed; Miriam Sparrow, NY Blood Center;

James J. Sabella, Brenda F. Szydlo, NY Missions; Sol Neil Corbin, Marc J. Gottridge, Carolyn Schurr, NY Public Library; Owen Zuckert, United Way; Richard Cherry, NY Urban Coalition; Stanley Weithorn, Council for Aid to Education, *amici curiae*.

BELLACOSA, J.:

The policy of the New York Public Service Commission (PSC) authorizing utilities to pass along to ratepayers part of the cost of corporate charitable contributions is challenged on First Amendment grounds under the United States Constitution. We agree with the result in the lower courts on the merits declaring the policy unconstitutional. The order of the Appellate Division should thus be affirmed. This Court also previously affirmed, at the threshold pleadings level, the determination that the PSC policy constituted state action (*Cahill* v. *Public Service Commn.*, 128 Misc2d 510, 113 AD2d 603, 69 NY2d 265, *reh denied* 69 NY2d 862, *cert denied* 494 US 829). That, of course, is the law of the case and sets the stage for the merits review here.

Prior to 1970, the PSC, as the State agency charged with plenary regulatory and rate-fixing powers over all public utilities in New York State (Public Service Law §§ 66[12]; 91[1]; 92[1]; 97[1]), did not allow recoupment from ratepayers of corporate sums given as charitable donations. These costs, in the millions of dollars, were absorbed within the particular utility's shareholder cost columns. In 1970, the PSC changed its policy and allowed reimbursement from customers through the authorized rate structure, and thus transformed these costs into and treated them as utility operating expenses. Appellants New York Telephone (NYTel) and Rochester Gas & Electric (RG&E) took advantage of the PSC's empowerment and sought retrieval of costs expended as contributions to numerous charities, including politically and religiously active organizations.

Cahill is a customer of appellant NYTel and of another utility which was a former intervenor in this case. His article 78 proceeding against the PSC and the utilities attacks this forced funding, through these publicly-regulated corporate conduits, (1) of organizations engaged in activities and causes contrary to his political or personal beliefs; (2) of religious institutions that expound beliefs inconsistent with his own; and (3) of organizations that promote the right to abortion, to which he is opposed on moral and religious grounds. The Attorney General also brought article 78 proceedings against the PSC and certain utilities seeking the same relief on behalf of all ratepayers. The proceedings were consolidated and are here as of right only by NYTel and RG&E, the PSC having shifted to a mute stance before this Court.

Cahill's First Amendment argument springs from his personal sense of real and perceived compulsion under the PSC policy effecting his contribution to and association with groups which advance beliefs contrary to his own and which are selected unilaterally and unrestrictedly by the utilities. The Attorney General advances essentially the same argument on behalf of consumers generally.

The First Amendment protects the right to speak and to associate freely, as well as the right not to speak or associate. The Supreme Court, almost 50 years ago, extolled people's rights under the First Amendment freedom from governmental interference with speech or association activities (*West Virginia Bd. of Ed.* v. *Barnette*, 319 US 624, 633). There, the First Amendment rights of pupils, Jehovah's Witnesses who refused to salute the flag, were upheld through the inspiring voice of Justice Jackson, whose opinion for the majority of the Court stated, in part:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

> what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. (*id.* at 642).

Almost 40 years later, the Supreme Court met a man who objected to the New Hampshire motto "Life Free or Die" on his license plate (*Wooley* v. *Maynard*, 430 US 705). The State argued that the motto served the state's interest by promoting an appreciation of history and state pride. The Court, harkening to *Barnette* (319 US 624, *supra*), protected the licensee's First Amendment freedom from participation in the dissemination of his state's ideological message on his license place (*see also, Elrod* v. *Burns*, 427 US 347; *Buckley* v. *Valeo*, 424 US 1).

Only a month later, the Supreme Court weighed the validity of a Michigan statute that permitted "agency shop" agreements under which nonunion employees had to pay the union a fee equal to union dues (*Abood* v. *Detroit Bd. of Educ.*, 431 US 209). Observing that the First Amendment is implicated in such circumstances because "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative" (*id.*, at 222), the Court concluded nonetheless that interference with the employees' association rights was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (*id.*, at 222.) The policies of labor peace and no "free riders" led the Court to hold the fee a qualifiedly permissible intrusion on the nonunion employees' First Amendment freedoms. For the first time, constitutional dispensation was accorded to an unimagined "exception" niche — to use Justice Jackson's word in *Barnette* — in the First Amend-

ment pantheon. Even so, *Abood* narrowly restricted itself to fees used to finance expenditures by the union only for the purposes of collective bargaining, contract administration and grievance adjustment (431 US, *supra*, at 225-226). The Court critically distinguished union expenditures for political or ideological purposes unrelated to collective bargaining, reasoning that compulsory political contributions "work[ ] no less an infringement of [the objecting employees'] constitutional rights" than do prohibitions against such contributions (*id.*, at 234). It then invoked Thomas Jefferson's ringing alarm that "to compel a man [or woman] to furnish contributions of money for the propagation of opinions which he [or she] disbelieves is sinful and tyrannical" (431 US, *supra*, at 234-235, n.31). To the extent that fees extracted from those who objected to the union's ideological viewpoint were used for political purposes, they were resoundingly condemned unanimously, with the plurality opinion expressing the rationale that this was violative of the First Amendment unless the activities were "germane to [the union] duties as collective bargaining representative" (431 US 209, *supra*, at 235).

Justice Powell issued the most extensive concurring opinion and agreed with the result more directly by stressing that the extracted payments for objectionable union expenditures could not withstand the traditional highest level of First Amendment scrutiny — paramount state interest. Justice Powell challenged the coerced service fees imposed on nonunion employees as so serious an impingement of First Amendment freedoms that he lamented the plurality's failure to utter the more exacting level of scrutiny as controlling (*id.*, at 254-255).

This abridged precedential array provides a sufficiently relevant dispositional context in which to examine the two principal arguments advanced by the utilities in this case. They argue that the First Amendment freedom reflected in the pertinent cases is not available because ratepayers will never be person-

ally identified with the ideological positions expressed through the charitable donations and entities selected by the utilities. Alternatively, they argue that even if First Amendment rights are implicated, the intrusion is minimal and should be measured against something less than a compelling or paramount state interest. They claim the "germaneness" proviso of *Abood* predominates, is satisfied, and controls the outcome in their favor.

We conclude that the critical inquiry starts with whether the extracted payments could reasonably be regarded by the individual ratepayer as an affirmation of or acquiescence in beliefs of the benefitted organizations, some of which beliefs happen to be anathema to the objecting ratepayer. The essence of the First Amendment impingement, as we have come to understand its modern nuanced application, is that the ratepayers are entitled to protection against forced financial support for causes and messages personally distasteful to them, because that would render those individuals faithless to their own beliefs. The monetary support here is direct, though small in amount, because it is spread across the entire rate-paying public (*Teachers* v. *Hudson*, 475 US 292, 305-308). Thus, the first prong of the utilities' rationalization for its [*sic*] PSC-authorized actions is far too cramped. It is enough that the extracted payments impose on the ratepayers, in some measure actually and in their estimation subjectively, particular and objectionable expressions and causes of a host of organizations.

In *Abood* (431 US 209, *supra*), it was unlikely that the public would attribute to the nonunion employees the ideological or political views advanced by the union merely because of the nonunion members' compelled financial support of the union. Yet, the constitutional canopy covered the employees if they viewed the compelled contribution as an endorsement of the union's nonessential public causes (*id.*, at 222). The parallel in the instant case is more potent. Here, ratepayers are powerless against governmentally regulated monopolies

and have no place else to seek indispensable public utilities services. By that unique circumstance, they are more seriously burdened and disadvantaged than the contributing nonunion members in *Abood* (*see, Cahill* v. *Public Service Commn.*, 69 NY2d 265, *supra*, 272-272 [*sic*]). In assessing the infringement on the ratepayers' freedoms, we may at least agree that while it may not be "sinful," it is surely "tyrannical," and that should be enough, with all the factors present here, to extend the First Amendment canopy (*Abood* v. *Detroit Bd. of Ed.*, 431 US, *supra*, at 234-235, n.31; *see also, Austin* v. *Michigan Chamber of Commerce*, ___ US ___, ___ S Ct ___; 58 USLW 4371, 4373; Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 BC L Rev 995, 1016-1023).

The utilities' contingent argument that a First Amendment intrusion may be justified, in any event, by something less than a compelling state interest is an artful proposition. Did the Supreme Court in *Abood* displace the compelling state interest test — the traditional strict scrutiny standard by which First Amendment intrusions are measured — with a "germaneness test"? We do not think it did. But if it did, the utilities urge, an intrusion "germane" to *some* state interest will be justified and will pass constitutional muster here.

Without question, the Supreme Court plurality in *Abood* built its rationale first on some identified governmental interest. Only then did Justice Stewart inject the germaneness facet in his differentiated analysis of the permitted intrusion on the nonmembers' First Amendment freedoms (*see also, Ellis* v. *Railway Clerks*, 466 US 433, at 455-456). In this case, therefore, no one can doubt that there is an obligation to present some sufficient state interest justifying the governmentally enforced retrieval of contributions from ratepayers. It must even be germane to the reasonable cost of doing business and to the provision of utility services. Only then can the cost be ulti-

mately chargeable to ratepayers instead of to the corporation itself and its shareholders. The "germaneness" notion is thus inextricably interwoven into the analysis of whether the state has established some government interest and is not a substitute for a state interest component (*see*, Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L Rev [1983]). That is as far as the Supreme Court's majority in *Abood* found it necessary to go as of that time.

Recently, in *Austin* v. *Michigan Chamber of Commerce* (___ US ___, ___ S Ct ___ [58 USLW 4371]), the Supreme Court applied the compelling state interest standard in upholding the Michigan Campaign Finance Act, which prohibits corporations from using corporate treasury funds for independent political expenditures, and required instead that separate, segregated funds be used for such expenditures. The Court held that statute was narrowly tailored to further the *compelling* governmental interest of eliminating distortion caused by corporate spending while permitting spending of segregated funds in a way that accurately reflects contributors' support for a corporation's political views (*see*, 58 USLW 4371, 4373).

In light of the recent Supreme Court pronouncement in *Austin* and consistent with our understanding of *Abood*, we believe appellants are required to demonstrate a compelling state intererst — the traditional First Amendment prerequisite. The tendered state interest in this case does not qualify. The germaneness aspect, so heavily leaned on by the utilities, in any event fails to bridge the gap because the nexus between the coerced recoupment of contributions and the provision of the utility services is too tenuous, or at least not proven with necessary definitiveness. We agree and understand that charitable contributions may enhance important qualify of life aspects in selected spheres of the affected communities, thus benefitting in many intangible ways the utilities' employees,

customers and boosters. The lineup of amici curiae supporting the position of the utilities in this case are [*sic*] a testament to that desideratum. But the effects of this gossamer civic good will on the elementary provision of utility services are at best speculative, and at worst clearly not a sufficient basis upon which to compromise First Amendment freedoms held by so many affected persons.

In sum, the utilities have not fulfilled their burden of justification for imposing on their ratepayers, rather than on their shareholders, the bill for their selected philanthropy. Indeed, the beneficial corporate public relations generated by the largesse made in the name of public utilities essentially advances predominately the private interests of the utility corporations and their shareholders — especially their financial interests — and are too peripheral to the *service* interests of the ratepayers. As we have stated previously in another context, "nothing in the Constitution requires that the shareholders get a free ride on the backs of the ratepayers" (*Matter of Consolidated Edison Co.* v. *Public Service Commn.*, 66 NY2d 369, 372).

Finally, the utilities protest that ratepayers' objections to compelled recoupment of charitable contributions is no different from objections raised by taxpayers obliged to financially support ideologically offensive programs directly effected by the government. As troublesome and controversial as governmental expenditures may be in their fiscal and policy implications, they are very different from what we are confronted with in this case. To be sure, the government may collect and spread benefits — even ones highly offensive to some citizens — through the entire tax-paying society. But this cannot form a constitutional predicate for the government to go the next gigantic step and delegate this unique power to publicly regulated enterprises, especially corporate utility monopolies, and to allow them to extract across-the-board ratepayer subsidies.

The doctrinal integrity of First Amendment jurisprudence must be protected from such governmental channelling or blockading of public expression through preferred agents, who then, as in this case, exert monolithic or majoritarian power through a mini-taxing authorization certainly against the interests and beliefs of some ratepayers. This would convert the free marketplace of ideas to the consumer-subsidized preserve of corporate utility ideas.

Accordingly, the order of the Appellate Division should be affirmed with costs.

Titone, J. (concurring):

I continue to believe, as I stated in *Cahill* v. *Public Service Commission* (69 NY2d 265, 274-280 [Titone, J. dissenting], cert den 484 US 829), that the challenged practice at issue here, i.e., regulatory setting of utility rates, is nothing more than governmental acquiescence in private economic decision-making not rising to the level of state action. Nonetheless, since the conclusion that state action is involved is now the "law of the case," I am bound by that conclusion and must analyze the First Amendment issue presented accordingly. Even with that element settled, however, I find myself unable to agree with my colleagues' approach to the complex and subtle problems presented by this ratepayer's arguments. While I concur in their ultimate conclusion that the challenged practice, if it involves "state action," is violative of the ratepayers' constitutional rights, the route I have travelled to reach that conclusion differs in several important respects from that which the majority has taken. Accordingly, I write separately.

First, I find the majority's heavy reliance on *Abood* v. *Detroit Bd. of Educ.*, (431 US 209) to be extremely troubling. The threshold question in *Abood*, which the Court discussed at the

outset of its opinion, was whether the government employees in that case could be compelled to pay union dues (or the equivalent in service fees) *at all* in light of the apparent infringement of their right not to associate with causes abhorrent to their beliefs. The Court acknowledged that a significant impairment of First Amendment rights was involved, since there may be some employees who are opposed to the very concept of unions and collective bargaining. However, the impairment arising from the forced contributions to union coffers was justified by an important governmental interest in promoting and preserving labor peace. It was in this context that the *Abood* Court went on to hold that the notion of forced contributions to the union is constitutionally valid only to the extent that the money is used for activities "germane to" collective bargaining, the union function most closely related to the identified state interest in labor peace.

The threshold constitutional problem that existed in *Abood* is not present in this case. In contrast to the obligatory union dues/service fees challenged in *Abood*, it does not violate any associational or expressional rights to compel an individual to pay for the services he has obtained from a utility company. This distinguishing feature is critical. Although reasonable minds may differ on this point, *Abood* may most readily be analyzed as falling within the well-established principle that even where laws impairing First Amendment rights are justified by "compelling" governmental interests, they must be narrowly tailored and may not go beyond that which is necessary to accomplish the identified governmental purpose that justifies the impairment. Viewed in that light, *Abood* would not be controlling here, since there is no initial impairment of the ratepayers' First Amendment rights that is analogous to the clear associational and expressional impairment involved in forcing public employees to contribute to union activities.

Furthermore, even if *Abood* is not to be viewed as a "narrow tailoring" case, the absence of the threshold constitutional prob-

lem discussed above is significant. In *Abood*, because of the very nature of unions as representative agencies, the forced payment of union dues/service fees implicated the employees associational rights. Like it or not, the employees were associated with the union and the union's activities by virtue of their involuntary contributions *and* of the union's reciprocal duty to represent them. Because of this initial implied association, the further affront of requiring dissidents to pay for the union's "nongermane" political activities — and to thereby associate themselves even further with offensive positions — was deemed violative of the employees' First Amendment expressional and associational rights. Here, in contrast, there is, once again, no implicit association of the ratepayer with the utility company by virtue of the former's payment of his utility bills. Therefore, the problem of compelled association that was an important consideration in *Abood* is not present here (*see also, Pruneyard Shopping Center* v. *Robins*, 447 US 79, 87).

Having concluded that *Abood* is not controlling, I am left to consider whether, in the absence of a rationale based directly on *Abood*, there is a constitutional prohibition against forcing an individual to contribute indirectly to causes with which he disagrees. On this issue, the observation that such a compulsion is "sinful and tyrannical" (431 US, at 234-235 n31, *supra*; *see*, majority slip op, at 7) is simply too facile. Our entire system of government by majority rule is built on the notion that individual citizens may be compelled to pay for, and even serve in wars fought for, causes and ideas that offend their own personal principles (*see, e.g., United States* v. *Seeger*, 380 US 163; *see also, Gillette* v. *United States*, 401 US 437). As one commentator has noted, "incursions on conscience through forced 'support' of distasteful causes is an inevitable concomitant of living in an organized society" and, accordingly, "pure peace of mind cannot be accorded high constitu-

tional status" in a non-anarchic state (Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-association*, 36 Rutgers L Rev 3, 25, 26).

While the First Amendment may, as a general matter, prohibit the state from restricting citizens' free expression of ideas, and from compelling them to express or even associate with ideas offensive to them (*see, Wooley* v. *Maynard*, 430 US 705), there can be no doubt that the government may, through general taxes or special levies, force citizens to pay for projects and causes that are abhorrent to their beliefs. Thus, the real question here is whether there is anything in the Constitution that prohibits the government from doing indirectly what it unquestionably may do directly, i.e., effect a transfer of wealth from individuals to arguably socially useful projects, by permitting private business entities to "tax" their customers as a means of financing their own charitable contributions.

As to this issue, it does not suffice to attack the Public Service Commission's policy on the ground that it represents "governmental channelling * * * of public expression through preferred agents" or that it "would convert the free marketplace of ideas to the consumer-subsidized preserve of corporate utility ideas" (majority slip op, at 11). Once again, the majority's hyperbole proves too much. The government establishes "preferred agents" — and delegates to corporations (and other private citizens) the power to spend public money on the causes of their choice — whenever it allows a tax deduction or credit for private "charitable contributions" (*Regan* v. *Taxation With Representation*, 461 US 531, 544).

Hence, there can be no serious constitutional objection to a governmental policy that delegates to a private concern the power to select the causes that will receive subsidies derived, directly or indirectly, from citizens' pockets, provided, of course, that the policy is a content-neutral one (*see, id.*, at 548). The constitutional objection, if any, must thus be based

on the other prong of the equation — the state's delegation of its power to impose a tax, as distinguished from its power to spend the taxed funds. It is this aspect of the PSC's policy which I find to be most troublesome.

The analogy between the typically governmental function of taxation and the utilities' government-approved "pass-along" policy exists because the latter entails the imposition on ratepayers of a levy that is then used to support activities aimed at advancing the interests of the community at large, as distinguished from the interests of the utilities' shareholders and employees. In a democratic society, such a levy is permissible, if implemented directly by the government, because the government is ultimately accountable to the taxed citizens through the established political mechanisms for the expression of the majority's will. These mechanisms are circumvented, however, when the decisions as to whether and how much to "tax" are delegated to a private corporation, which is not accountable through any of these mechanisms.

Viewed in this light, the problem presented in this case may more readily be categorized as one involving the "no taxation without representation" principle than as one involving an impairment of First Amendment associational or expressional rights. Whatever its proper characterization, however, it seems clear that, assuming the existence of state action, a problem of constitutional magnitude exists. Accordingly, I concur in the majority's decision to affirm the order of the court below.

Before closing, I must stress that my conclusion herein does not represent any implicit skepticism about the value to the community of the charitable activities that the PSC policy was designed to promote — or about the social utility of the policy itself. The past decade has ended with a widespread recognition of the limits of government's ability to tax its citizens to pay for necessary and important social programs. This recognition has, in turn, brought about an increased sensitivity to the press-

ing need for volunteerism in general and, more specifically, governmental policies that encourage businesses with large concentrations of capital to donate to social and charitable projects. While the PSC's efforts to promote volunteerism have, unfortunately, been proven to be constitutionally problematic in this specific context and, for that reason, cannot be upheld, I would hope that the Court's holding here will not be perceived as a rejection of the charitable intentions, as well as the goals, underlying the challenged actions of both the PSC and the utility companies it regulates.

* * * * * * *

Order affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Wachtler and Judges Simons, Kaye and Alexander concur. Judge Titone concurs in a separate opinion. Judge Hancock took no part.

Decided May 10, 1990

APPENDIX B.

Supreme Court — Appellate Division
Third Judicial Department

In the Matter of JOSEPH CAHILL, Respondent, and ROBERT ABRAMS, as Attorney-General of the State of New York, Respondent-Appellant, v. PUBLIC SERVICE COMMISSION et al., Appellants-Respondents.

June 1, 1989

SUMMARY

CROSS APPEALS from a judgment of the Supreme Court (Lawrence E. Kahn, J.), entered August 9, 1988 in Albany County in a proceeding pursuant to CPLR article 78, which granted petitions to the extent of annulling the policy of respondent Public Service Commission (PSC) whereby rates are set that include recovery by utilities of charitable contributions as proper operating expenses, prohibited the PSC from setting rates in which utilities recover the cost of charitable contributions, and denied the petitions to the extent that they sought a monetary refund.

OPINION OF THE COURT

HARVEY, J.

The consolidated proceedings before this court already have a lengthy decisional history. The primary issue presented in these proceedings is the 1st Amendment challenge by petitioners of the policy of respondent Public Service Commission (hereinafter the PSC) authorizing the utilities under its control to pass along the cost of their charitable contributions to their customers as part of their utility rates. The proceeding commenced by petitioner Joseph Cahill against the PSC and respondent New York Telephone Company (hereinafter NYT)

was previously before this court upon an appeal from the denial of respondents' preanswer motions to dismiss the petition on various grounds, including lack of State action (113 AD2d 603). This court affirmed the order with a divided court, holding that a threshold claim of State action had in fact been pleaded by petitioner. We subsequently granted respondents permission to appeal to the Court of Appeals and certified the following question: "Did this court err, as a matter of law, in affirming Special Term's order which denied respondents' motions to dismiss the petition?" The Court of Appeals subsequently affirmed this court's order, finding that Cahill's petition stated a cognizable claim (69 NY2d 265). An application by respondents to the United States Supreme Court for certiorari was denied (___ US ___, 108 S Ct 100).

During the pendency of this proceeding, respondents Niagara Mohawk Power Corporation (hereinafter NIMO), Rochester Gas and Electric Corporation (hereinafter RG&E), and Central Hudson Gas & Electric Corporation (hereinafter Central Hudson) each requested a PSC order authorizing the recovery in rates of various amounts paid by the utilities during projected rate years as charitable contributions. Although petitioner Attorney-General intervened in the separate rate proceedings, arguing that such an allowance would violate ratepayers' rights under the 1st and 14th Amendments, the PSC rejected this argument and issued the requested orders. Thereafter, the Attorney-General commenced two CPLR article 78 proceedings against the PSC, NIMO, RG&E and Central Hudson seeking (1) annulment of the PSC's orders insofar as they allowed for recovery from the ratepayers for the utilities' charitable contributions, and (2) a refund, with interest, of all amounts collected pursuant to the orders. The PSC then successfully moved for consolidation of the proceedings commenced by the Attorney-General with the remanded Cahill proceeding.

Answers were interposed in all proceedings denying that the PSC's policy violates the 1st and 14th Amendment rights

of ratepayers. Respondents also sought dismissal of the proceeding or an evidentiary trial in order to prove that the contributions charged to the ratepayers were not made for political, ideological or religious purposes even when the donations were made to, for example, sectarian institutions.

When the case was back before Supreme Court once again, the posture of the case had changed from a determination of whether the petition stated a cognizable claim to that of a determination of whether the claim was supported by the evidence. The court found that there was no disagreement among the parties as to facts which were material and relevant. Knowing that these facts were assumed by the Court of Appeals to be true when it made its decision as to a cognizable claim, Supreme Court determined that the policy of the PSC was violative of the ratepayers' constitutional rights.

It is our view that Supreme Court properly determined that the policy of the PSC allowing utilities to charge their charitable contributions to ratepayers as legitimate operating expenses impermissibly violates the ratepayers' 1st and 14th Amendment rights. Despite respondents' contentions otherwise, petitioners have sufficiently established that the ratepayers' 1st Amendment rights were infringed by the PSC's policy of compelling the ratepayers to defray the utilities' charitable expenses (*see, Abood v. Detroit Bd. of Educ.*, 431 US 209, 233-235, *see also*, at 256 [Powell, J., concurring]; *Consolidated Edison Co. v. Public Serv. Commn.*, 447 U.S. 530, 552 [Blackmun, J., dissenting]; *Matter of Consolidated Edison Co. v. Public Serv. Commn.*, 66 NY2d 369, 373, *appeal dismissed* 475 US 1114). Cahill has sufficiently shown that the utilities support organizations which expound beliefs inconsistent with his religious beliefs as well as with his political and personal beliefs. The fact that respondents allege that the majority of the organizations they support are ideologically neutral and promote wholesome community-minded causes is of no consequence. Nota-

bly, the United States Supreme Court has clearly stated that nonpolitical speech is entitled to 1st Amendment protection (*see, Abood v. Detroit Bd. of Educ., supra* at 231).

It is not for this court to examine each contribution and subjectively decide which organizations particular individuals may or may not find offensive. What an individual chooses to believe and what organizations he or she chooses to support are personal decisions that should not be speculated upon. When it is actually the State compelling that individual to support these causes as a necessary condition to receiving utility service, then it is clear that the 1st Amendment has been violated (*see, Matter of Cahill v. Public Serv. Commn.*, 69 NY2d 265, 270-271, *supra*; *see also, Abood v. Detroit Bd. of Educ.*, 431 US 209, 235-236, *supra*). Thus, as the *Abood v. Detroit Bd. of Educ.* (*supra*) case teaches us, it is the State's action in compelling the donations from the ratepayers and not the private decisions of the utilities as to where to bestow the money which is at issue here (*see, Matter of Cahill v. Public Serv. Commn., supra*). Moreover, scrutinizing every charity or organization benefited by the utilities' donations would serve little purpose since neither this court nor the PSC could limit the utilities' choice of charities without impinging on the utilities' own free speech rights (*see, Consolidated Edison Co. v. Public Serv. Commn.*, 447 US 530, *supra*).

Establishing that 1st Amendment rights have been impaired does not end our inquiry. Once this showing is made, it is necessary that respondents demonstrate that (1) the countervailing State interest is sufficiently important or compelling to justify the 1st Amendment infringement, and (2) that the means used were carefully or narrowly tailored to minimize the infringement (*see, Chicago Teachers v. Hudson*, 475 US 292, 303, n.11; *Abood v. Detroit Bd. of Educ., supra*, at 222-223; *Barbar v. Bullard*, 93 AD2d 672, *aff'd* 61 NY2d

631). It has been said that, when resolving a conflict between individual rights and governmental goals, "[i]f the value of the right clearly outweighs the value of the challenged practice, the [Constitution] proscribes the practice and the state has deprived [the individual] of a [guaranteed] right * * * by failing to protect the right from the impact of the challenged practice" (Nowak, Rotunda & Young, Constitutional Law, ch 14, § V, at 524- 525 [2d ed]).

Addressing the first of these criteria, respondents emphasize the State's compelling interest in ensuring the provision of adequate utility service as justification for the compelled contribution policy. According to respondents, this interest is best served by allowing the utilities to include operating expenses such as charitable contributions in their rates. Respondents also contend that Business Corporation Law § 202(a)(12) establishes State policy in favor of corporate giving and argue that the PSC practice of labeling charitable contributions as operating expenses merely implements this policy. The PSC has adopted the view that utilities: " 'have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business' " (*Re New York Tel. Co.*, case 25155, 84 PUR3d 321, 349, quoting *Re United Gas Pipe Line Co.*, 54 PUR3d 285, 295, opn No. 428).

Concerning the latter argument, we find nothing compelling in the State's policy of permitting corporate giving since the giving of charitable contributions is wholly discretionary. However, as monopolies, the utilities are in an entirely different posture from that of private corporations since the customer does not have the option of choosing another service if a utility expends an inordinate amount on charitable donations and then passes the cost on to the ratepayer (*see, Matter of Cahill v. Public Serv. Commn.*, 69 NY2d 265, 272, *supra*). No neces-

sary relationship between providing utility service and making charitable donations has been established. Respondents strain to demonstrate such a relationship by pointing to the benefits the community receives as a whole by the charitable contributions and how they improve the local business climate. In our view, it is purely speculative to argue that if compelled contributions were abolished utility service would suffer. Respondents offered no proof to support such a contention, nor could they. As previously mentioned, all charitable contributions are purely discretionary. Prior to the implementation of the present policy by the PSC in 1970, charitable contributions were made by the shareholders from the utilities' profits with no apparent hardship to either the utilities or their customers. Consequently, the abolition of the present policy would not be disastrous and presumably would not discourage charitable contributions by utility shareholders since benefits such as good will toward the management of utilities would be a likely result.

It is also to be noted that the broad PSC policy at issue is unconstitutional because it is indisputably not narrowly tailored to meet State goals by the least restrictive means possible. No effort was ever made to allow ratepayers to choose which charities would benefit from their donations or to allow ratepayers to opt out from contributing altogether.

Another issue raised by the parties is the question of the Attorney-General's standing to bring his petitions. Similar to Supreme Court, we also found it unnecessary to reach this issue due to our finding that the PSC's policy should be abolished as should all orders implementing it. We also agree with Supreme Court's conclusion that the Attorney-General's request for refunds should not be granted in this particular case. In general, all parties agree that whether refunds should be ordered depends, among other things, upon (1) the reasonableness and degree of reliance by the utilities on the payments, and (2) the necessity of a refund to protect the substantive con-

stitutional rights involved (*see, Roemer v. Maryland Pub. Works Bd.*, 426 US 736, 767, n.23; *Lemon v. Kurtzman*, 411 US 192). Here, the equities weigh in favor of a prospective application only. The utilities involved relied on the validity of the PSC's policy of allowing charitable contributions as operating expenses. The computation of refunds would be a monumental task and is not necessary to vindicate the ratepayers' constitutional rights. It is our view that no refund should be ordered (*see, State Communities Aid Assn. v. Regan*, 112 AD2d 681, 683, *lv denied* 69 NY2d 821).

MAHONEY, P. J., WEISS, LEVINE and MERCURE, JJ., concur.

Judgment affirmed, without costs.

Appeal from order dismissed, as academic, without costs.

APPENDIX C.

State of New York Supreme Court
County of Albany

JOSEPH CAHILL,

Petitioner,

–against–

THE PUBLIC SERVICE COMMISSION; PETER BRADFORD; HAROLD A. JERRY, JR., GAIL GARFIELD SCHWART; ELI M. NOAM; JAMES T. McFARLAND; HENRY G. WILLIAMS; and the NEW YORK TELEPHONE COMPANY,

Respondents,

–and–

CENTRAL HUDSON GAS & ELECTRIC CORP.,

Intervenor-Respondent.

ROBERT ABRAMS, Attorney General of the State of New York,

Petitioner,

–against–

THE PUBLIC SERVICE COMMISSION of the State of New York and the NIAGARA MOHAWK POWER CORPORATION,

Respondents.

ROBERT ABRAMS, Attorney General of the State of New York,

Petitioner,

–against–

THE PUBLIC SERVICE COMMISSION of the State of New York, THE ROCHESTER GAS AND ELECTRIC CORPORATION, and the CENTRAL HUDSON GAS AND ELECTRIC CORPORATION,

Respondents.

KAHN, J.

The above three captioned Article 78 proceedings all seek to halt the long-standing practice of the New York State Public Service Commission (PSC), which allows utilities to include charitable contributions as proper operating expenses in establishing utility rates.

The proceeding entitled *Matter of Cahill* has an extensive decisional history. The remaining two proceedings have subsequently been commenced by the Attorney General to seek similar relief, and additionally, a refund of all sums recovered through such charitable donations.

A brief procedural history of the Cahill litigation is necessary. By decision dated May 14, 1984, this court addressed respondent's motion to dismiss the petition upon the ground that there was a lack of subject matter jurisdiction, a failure to exhaust administrative remedies, a statute of limitations bar and that the petition failed to state a cause of action. While denying the motion in its entirety, the court could not render any final determination upon the application. No answer had been served, thus preventing the joinder of issue and a final resolution of the issue which is at the heart of this controversy (*Cahill v. Public Serv. Comm.*, 128 Misc 2d 512). That determination was affirmed, the Third Department finding that "State action" would exist where the PSC permits the cost of charitable donations to be passed along to taxpayers (113 AD2d 603, 606). Finally, the Court of Appeals rendered its determination in the matter, again affirming the previous two decisions (69 NY2d 262). The three separate proceedings were ultimately made returnable at Albany County Special Term on January 29, 1988, The Honorable William McDermott, presiding. Thereat, he transferred them to this court, which upon hearing counsel for the various parties, agreed to render a determination with respect to all three.

As aforesaid, in its original denial of the motion to dismiss in *Cahill*, issue had not been joined, thereby preventing any final determination on the merits. Utilization of this procedure in cases such as the one at bar, while technically permissible pursuant to statute, is not looked upon favorably. The issue was specifically addressed in *R. Bernstein* v. *Popolizio*, (97 AD2d 735). Therein, the Appellate Division disapproved of the practice of motions "to dismiss an Article 78 proceeding supported by apparently all the proofs it has but requesting that if the motion is denied, respondent should be given an opportunity to serve and file its answer." That occurrence is precisely the nature of respondents' tactics in *Cahill*. Respondents actively litigated the central inquiry upon the instant proceeding, to wit, whether the practice of the Public Service Commission, as pled in the petition, constitutes a state action.

Citing *Abood v. Detroit Board of Education*, (431 U.S. 209), the Court of Appeals squarely and unequivocally resolved that issue when it held that "the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate petitioner's rights under the First and Fourteenth Amendments of the United States Constitution." (*Cahill, supra*, p. 270).

As initially required by this court, respondents have now answered the Cahill petition and joined issue. Aside from attempting to relitigate and rehash the previously determined question of state action, the answers raise no bona fide questions of fact concerning the essence of this litigation, which is "the policy and directives of the PSC in establishing utility rates which include charitable contributions as operating expenses." (*Cahill, supra*, p. 272). The answer does not raise any debatable issue on this point. While the submissions attempt to obliterate the lines of state action which have been found, the attempt is semantic only. The plain, uncontroverted fact is that such a policy has existed for nearly eighteen years

and is routinely applied in all present rate cases. The Court of Appeals has held that the practice constitutes an impermissible form of state action which is violative of petitioner's constitutional guarantees as set forth in the First and Fourteenth Amendments. It matters not that an individual ratepayer's actual contribution may be negligible, for any infringement on such a constitutionally protected right invariably leads to erosion of our fundamental liberties. Accordingly, the request for relief by petitioner Cahill shall be granted to the extent that he shall have a judgment which annuls the practice of including charitable contributions as authorized expenditures in establishing utility rates.

Two separate issues are raised by the pleadings in the Attorney General's consolidated proceedings. The issue of his standing to maintain the litigation has been raised. Also, he has asked for restitution of the monies previously obtained by the various public utilities pursuant to the PSC's policy of including charitable contributions as operating expenses.

Concerning the initial threshold issue, the court shall "assume, without deciding, that petitioners had standing to bring this proceeding" (*Matter of Roman Catholic Diocese of Albany* v. *New York State Dept. of Health*, 66 NY2d 948). While the court has substantial doubt as to the existence of standing by the Attorney General (see: *Matter of Abrams* v. *New York City Conciliation and Appeals Board*, 123 Misc.2d 47), pursuant to the doctrine enunciated in *Matter of Roman Catholic Diocese of Albany, supra*, it need not determine that issue in order that the merits of the Attorney General's request for refunds may be addressed without further protracting this litigation.

The request for a refund, with interest, with respect to previous charitable donations does not find support in any applicable case law. The proper remedy is to adjust such rates prospectively, not to provide refunds, absent extraordinary and limited circumstances not present in the case at bar (see: *Roemer* v. *Maryland Bd. of Public Works*, 426 U.S. 736).

The petition of Joseph Cahill for a judgment annulling the policy adopted by the PSC in 1970 whereby charitable contributions by utilities are allowed as proper operating expenses shall be granted. The petitions of the Attorney General shall both be denied to the extent that they seek any monetary refund. All papers to attorneys for petitioner Cahill, who shall submit one order and judgment, on notice, in conformance herewith, with a copy of this decision annexed.

DATED: May 10, 1988
Albany, New York

APPENDIX D.

State of New York Court of Appeals

No. 442

In the Matter of Joseph Cahill,
Respondent,

v.

Public Service Commission, et al.,
Appellants,
and Central Hudson Gas and
Electric Corp.,
Intervenor-Appellant.

OPINION
This opinion is uncorrected and subject to revision before publication in the New York Reports.

Decided December 19, 1986

David E. Blabey, Lawrence G. Malone, & Leonard Van-Ryn, Albany, for appellant PSC.

John M. Clarke, Gerald M. Oscar, & Thomas J. Farrelly, NY City, for appellant NY Telephone.

Walter A. Bossert, Jr., Davison W. Grant, & Thomas C. Hutton, NY City, for appellant Central Hudson Gas & Electric.

Richard Emery, NY City, for respondent.

HANCOCK, JR., J.:

We hold that acts of the New York State Public Service Commission (PSC) in setting rates which compel a utility customer to pay for charitable contributions made by the utility constitute governmental conduct which gives rise to a cognizable claim by that customer that his rights under the First Amendment of the United States Constitution have been violated.

I

In a CPLR article 78 proceeding against the PSC and New York Telephone, petitioner, a customer of New York Telephone, seeks to annul two actions of the PSC:

(1) The policy adopted by the PSC in 1970 whereby charitable contributions by utilities are allowed as "proper operating expenses" (*New York Telephone*, Case 25155 [July 1, 1978] at 378)[1] and

(2) The PSC "Opinion and Order Determining Revenue Requirement and Rate Structure" dated June 22, 1984 (Opinion No. 84-16) specifically authorizing respondent New York Telephone Company to charge its ratepayers, including petitioner, for charitable donations of approximately $3,000,000 in 1984, and establishing rates to be paid by customers for service which are based on the inclusion of these contributions as operating costs.

Petitioner, a Catholic, alleges that as a consequence of the PSC policy and rate order he is compelled to contribute to "religious institutions" espousing beliefs inconsistent with his own, to charities supporting "the right to an abortion" contrary to his "moral and religious" beliefs and to causes which he finds objectionable on "personal and political grounds." "No matter how small a portion of his bill is affected", he opposes these contributions "as a matter of principle" and asserts that the PSC has denied him his constitutional rights under the free speech, free exercise and establishment clauses of the First

[1] Prior to 1970 the PSC refused to allow inclusion of charitable contributions as operating expenses on the grounds that they were "not necessary to the conduct of business and that they [were] made at the sole discretion of Company officers to donees of their choosing." *New York Telephone Co.*, Case No. 25155 (July 1, 1970), p. 378. The 1970 policy allows charitable contributions as "proper operating expenses" provided they are "not excessive in total" and that the donations are not irrelevant to the "civic responsibilities" of the utilities. Future allowances are to be measured from pre-1970 contribution levels.

Amendment of the federal Constitution, citing *Abood* v. *Detroit Bd. of Education* (431 US 209).

In lieu of answering the petition, respondents[2] moved to dismiss (CPLR 7804[f]; CPLR 3111[a][7]) contending, among other things, that the utilities' actions in passing along the cost of charitable contributions were essentially private decisions and that the government's limited involvement was an insufficient basis for finding a violation of petitioner's First Amendment rights, citing *Jackson* v. *Metropolitan Edison Co.* (419 US 345) and *Blum* v. *Yaretsky* (457 US 991). Special Term rejected respondents' argument (128 Misc 2d 510) and the Appellate Division, with a divided court, affirmed, holding that petitioner had adequately stated a "threshold claim of 'State action'" by "alleging that the PSC adopted a policy which permitted the costs of charitable donations to be passed along to ratepayers" (113 AD2d 603, 606). The dissenters found that this case fell "squarely under *Blum* [*supra*] and *Jackson*" (*supra*) and that petitioner had failed to allege a sufficient nexus between the challenged acts and the State (*id.*, at 607).

The Appellate Division granted the respondents permission to appeal to our Court, certifying the following question: "Did the court err as a matter of law, in affirming Special Term's order which denied respondents' motion to dismiss the petition?" For reasons which will appear, we hold that the question should be answered in the negative and the order of the Appellate Division affirmed.

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[2] Central Hudson Gas and Electric Corporation, which supplies electricity to the petitioner under a franchise granted by the State, was granted permission to intervene in this proceeding, and joined in the Commission's motion to dismiss the petition.

II

The critical issue is whether petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the state has merely acquiesced, as respondents and the dissenters contend, or governmental conduct of an agency of the state itself. Because it involves the latter we hold that under the controlling authority of *Abood* v. *Detroit Bd. of Education* (431 US 209), *supra*, the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate petitioner's rights under the First and Fourteenth Amendments of the United States Constitution. In *Abood*, plaintiffs, nonunion teachers, challenged the validity of a union shop clause in the collective bargaining agreement between their employer and the teachers' union because dues they were compelled to pay were being used by the union for legislative lobbying and for the support of political candidates. The Supreme Court, in holding that plaintiffs' rights were infringed by being forced to pay a portion of these contributions under threat of loss of their jobs, stated:

> [T]he freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642.
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso* v. *Watkins*, 367 U.S. 488, or to associate with a political party, *Elrod* v. *Burns*, *supra*, see 427 U.S. at 363-364, n.17, as a condition of retaining public employment.

* * * * *

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. *Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.* (*Abood, supra*, at 234-235; emphasis added).

There is no basis for distinguishing *Abood*. The acts giving rise to the claims here and in *Abood* were not the private decisions to make charitable and political contributions but the governmental actions in compelling the utility customer here and the nonunion teachers in *Abood* to pay for them. In *Abood* the coercion came from the State-sanctioned union shop clause under which nonunion members could be discharged for nonpayment. In this proceeding, the coercion results from the fact that the State establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.

The dissent points to no difference between the coercive effect of the PSC rate directives and the coercive effect of the union shop clause in *Abood*. Instead, for purposes of its argument, it constructs a model of a utility which omits the utility's distinguishing characteristic as a legalized monopoly — public control. The dissent then analyzes the utility's behavior "without any governmental intervention at all" (Dissenting Opn, p) as though it were a private company and readily concludes

that "utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they might choose to make", and that "the PSC has done no more than merely refuse to interfere with what is essentially a private decision" (Dissenting Opn, p). To reach these conclusions, it must be emphasized, the dissent has assumed the validity of two propositions: that "the regulatory powers of the state [are] not involved in the rate-setting process" (Dissenting Opn, p) and that the charitable contributions reflected in the rates are "charges in which the PSC has, in the truest sense of the word, merely 'acquiesced' " (Dissenting Opn, p). But these assumptions find no support in law or fact. A public utility is franchised by the state (Public Service Law §§ 68, 99) to provide services to the public at just and reasonable rates (Public Service Law §§ 65, 91) in exchange for a proper return on its investment (*see*, Public Service Law § 97; *Boonville* v. *Maltbie*, 272 NY 40). Operating as a monopoly (*see, People ex rel. New York Edison* v. *Willcox*, 207 NY 86, 93-94), it is subject to regulation by the PSC (Public Service Law §§ 66, 94). The PSC oversees the utilities for the public good as an exercise of the state's police powers (*People ex rel. New York Electric Lines* v. *Squire*, 145 US 175) and has exclusive authority to determine just and reasonable rates (Public Service Law §§ 66[12], 92[2]). It establishes maximum rates which may not be exceeded (Public Service Law §§ 65[1], 91[1]). In fact, no utility may charge more or less than the rates established by the PSC (*see*, Public Service Law §§ 66[12], 92[2]).

Aside from the fallacy of comparing a public utility with a private company due to a utility's uniquely public character, the analogy which the dissent draws to the decisions of corporate officials of a private company in making charitable contributions (Dissenting Opn, p) cannot stand for a more basic reason. What is at issue here is *not the conduct* of utility offi-

cials, but the policy and directives of the Public Service Commission in establishing utility rates which include charitable contributions as operating expenses. And in any event the effect of a decision of a private corporation to pass through to its customers the costs of charitable contributions simply cannot be compared with the action of the PSC in setting utility rates which include such contributions. In the case of a private corporation a customer who disapproves has a voice — he may decide not to buy the product. In the case of a utility the customer has no voice — the contribution is locked into the rate approved by the PSC, and the customer must pay or go without service.

For the same basic reason — that this proceeding challenges the public conduct of the PSC and not the private conduct of the utilities — *Jackson* v. *Metropolitan Edison Co.* (419 US 345), *supra*, and *Blum* v. *Yaretsky* (457 US 991), *supra*, are inapplicable. In *Jackson* the suit was against the utility and not the Pennsylvania Utility Commission. The basis of the lawsuit was solely the private act of the utility in shutting off electric service, and the Court simply dismissed plaintiff's arguments that that private conduct should be attributed to the state merely because of its role in regulating the utility and in approving the regulations under which the termination was effected. Similarly, in *Blum* the actions which the nursing home patients sought to attribute to the state were decisions made by "utilization review committees" of private nursing homes to transfer patients to facilities providing less intensive medical care. The Court held that these committee decisions did not become state action solely because the nursing homes were subject to state regulation and the state responded to the decisions by adjusting the patients' Medicaid benefits.

To bring the case within *Jackson* and *Blum*, the dissent, referring to the PSC's brief (Dissenting Opn, p), minimizes the function of the PSC in rate setting and characterizes its role

as little more than passive acquiescence. Such a narrow view of the PSC's function, as already noted, is at odds with the broad grant of rate-setting authority vested in the PSC by the Legislature (Public Service Law §§ 66, 72, 91). It also runs counter to our own decisions holding that the function of rate setting is left to the discretion of the Public Service Commission, and that so long as the rates are just and reasonable, they may not be set aside (*see, Abrams* v. *Public Serv. Commn.*, 67 NY2d 205, 211-212; *Merchants* v. *Public Serv. Commn.*, 45 NY2d 661).

As to petitioner, a customer who must purchase service from a public utility at rates established by the state, the combined effect of the utility's monopoly status and the rate order is no less coercive than the threats of employment loss in *Abood*.[3] Like plaintiffs' right to hold their jobs in *Abood*, petitioner, a member of the public in the utility's franchised area, has an unquestioned legal right to utility service (Public Service Law §§ 65, 91). Like the plaintiffs in *Abood*, he must forego that right or be subject to the "compulsory subsidization of ideological activity" condemned in *Abood* (431 US at 237) and its progeny (*see, Chicago Teachers Union* v. *Hudson*, ___ US ___, 54 USLW 4231; *Ellis* v. *Railway Clerks*, 466 US 435; *Galda* v. *Bloustein*, 686 F2d 159). That petitioner's proportionate share of the objected to contributions is small is of no moment, "for, whatever the amount, the quality of [petitioner's] interest in not being compelled to subsidize the propagation

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[3] We note that the current policy of the PSC in permitting utilities to include charitable contributions as costs conflicts with judicial decisions in other jurisdictions holding similar pass-through provisions unlawful as involuntary levies on ratepayers (*see, e.g., Pacific Telephone & Telegraph Company* v. *Public Utilities Commission*, 401 P.2d 353 [1965]; *Chesapeake & Potomac Telephone Company* v. *Public Service Commission*, 187 A2d 475 [1963]; *Illinois Bell Telephone Company* v. *Illinois Commerce Commission*, 303 N.E.2d 364 [1973]; *State ex rel. LaClede Gas Company* v. *Public Service Commission*, 600 S.W.2d 222, 229 [Mo. 1980], *appeal dismissed*, 449 U.S. 1072 [1981]).

of political or ideological views that [he] oppose[s] is clear" (*Chicago Teachers Union* v. *Hudson*, 54 USLW at 4235).[4] To petitioner Cahill one salient fact remains: he is compelled to support institutions he opposes on moral and religious grounds because he must subscribe to the utility and pay rates based, in part, on those contributions, or be deprived of his right to electric and telephone service.

We address only the question certified by the Appellate Division. The respondents' remaining contentions, that the petition should be dismissed due to petitioner's failure to exhaust administrative remedies, that the petition was not timely commenced, and that petitioner lacked standing to bring the proceeding are not before us. The certified question should be answered in the negative and the order of the Appellate Division should be affirmed, with costs.

TITONE, J: (dissenting):

Petitioner commenced this proceeding to challenge a decision of the Public Service Commission that allows utility companies to pass along a portion of the cost of their charitable donations to their ratepayers. His challenge is based on the claim that the decision impairs petitioner's and other ratepayers' federal First Amendment rights to freedom of expression and worship by requiring them to contribute indirectly to charitable groups espousing views antithetical to their own. However we may feel about the wisdom of the PSC's policy, we conclude

[4] Justice Stevens in *Chicago Teachers*, stressing the point that "[t]he amount at stake for each individual dissenter does not diminish [his] concern", writes: "In *Abood*, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even 'three pence' for 'the propagation of opinions which he disbelieves'" (*Chicago Teachers Union* v. *Hudson*, ___ US ___, 54 USLW at 4235).

that the state's regulatory involvement in the cost pass-along that petitioner finds offensive is an insufficient basis for finding that his rights have been impaired by the actions of a governmental entity. Accordingly, we dissent and vote to reverse the Appellate Division order.

The Public Service Commission decision that is challenged here was actually made in 1970. Prior to 1970, the PSC exercised its regulatory authority over utility rates by requiring the utilities' shareholders to absorb the cost of charitable contributions rather than passing those costs along to the consumer in the form of increased prices for utility service. The PSC rescinded this policy in 1970 and replaced it with a ruling allowing utilities to recover from ratepayers a portion of their charitable contribution costs calculated by a formula based on the individual utility's adjusted pre-1970 level of expenditure (*New York Telephone Company*, Case 25155, 84 PUR3d 321, 349-350). This change in policy reflected the PSC's view that charitable contributions can be a legitimate business expense that ought to be recognized as a form of overhead. In its ruling, the PSC stated that "it is not our function to screen lists of contributions, to pick out the good from the bad," but it further noted that it was "prepared to examine carefully claims for charitable contributions" and would disallow such claims "if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility" (*New York Telephone Company, supra*, p 349). In accordance with this policy, the PSC, in June of 1984, approved a request by the New York Telephone Company to include in its rates to consumers part of the cost of its contributions to several thousand charitable organizations. Petitioner thereafter commenced the present CPLR article 78 proceeding, arguing that the PSC's actions in approving the pass-along violated both the establishment and freedom of expression clauses in the First

Amendment of the federal Constitution.[1] Petitioner's constitutional claim is based largely on the Supreme Court's decision in *Abood* v. *Detroit Bd. of Educ.* (431 US 209), in which the Court held that forced indirect contributions to political groups in the form of mandatory agency-shop dues violates an employee's right to freedom of expression. In *Abood*, however, the dues payments were mandated by a collective bargaining agreement between the union and a governmental employer and were enforced by that employer's coercive power to discharge those who did not wish to participate. Thus, there was no doubt in *Abood* that the constitutional violation complained of was the product of state action.

Here, in contrast, the question of the state's involvement is very much in dispute. Although petitioner insists that his quarrel is solely with the policy decision of the PSC, a governmental entity, it is apparent that the real source of his aggrievement is the action of the private utility, which, through the inherently coercive power of its status as a monopoly provider, is forcing him to make indirect contributions to charities he finds objectionable.[2] Consequently, although the majority concludes otherwise, *Abood* is manifestly not controlling here. What is more in point is the body of case law that addresses the problem of when the actions of a private entity may fairly be said to constitute "state action."

It is beyond question that the First and Fourteenth Amendments, upon which petitioner's claim depends, provide "no

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[1] Petitioner has not asserted any claim that his rights under our State Constitution (NY Const, Act I, 5, 8) have been violated (*compare SHAD Alliance* v. *Smith Haven Mall*, 66 NY2d 496, *with Sharrock* v. *Dell Buick-Cadillac*, 45 NY2d 152).

[2] Contrary to the majority's view, that petitioner initially named the PSC and not the utility as the party defendant is of no consequence. In determining whether a claimed deprivation of a constitutional right involves an action by the state or merely a private decision, we look to the substance of the claim and not to the status of the party who has been sued (*see Blum* v. *Yaretsky*, 457 US 991, 1003).

shield against merely private conduct, however . . . wrongful" (*Shelley* v. *Kraemer*, 334 US 1, 13); *see Hudgens* v. *NLRB*, 424 US 507; *SHAD Alliance* v. *Smith Haven Mall*, 66 NY2d 496). Rather, those amendments protect only against those infringements of liberty that may in some sense be said to emanate from the actions of the state (*see Jackson* v. *Metropolitan Edison Co.*, 419 US 345). It has been candidly ackowledged that "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer" (*Jackson* v. *Metropolitan Edison Co.*, *supra*, pp 349-350). Nonetheless, there are a number of previously applied standards that provide us with some guidance.

First, the fact that the private concern is heavily regulated by government is not alone sufficient to render the conduct of that private entity "state action" (*Jackson* v. *Metropolitan Edison Co.*, *supra*, pp 350-353; *see Blum* v. *Yaretsky*, 457 US 991). While the actions of private concerns having these characteristics may "more readily be found to be 'state' acts" than will the actions of others, there must still be a 'sufficiently close nexus between the State and the challenged action . . . so that the action . . . may be fairly treated as that of the State itself" (*Jackson* v. *Metropolitan Edison Co.*, *supra*, p 351). Significantly, this "nexus" cannot be established by simply showing that the private entity provides an essential public service or has a monopoly on the market, where the service in question is not one that the state would traditionally provide (*id.* pp 351-353).

A sufficient nexus may be demonstrated where the private action in question was compelled or directed by the state (*see Blum* v. *Yaretsky*, *supra*, pp 1004-1005; *Jackson* v. *Metropolitan Edison Co.*, *supra*, p 457). Alternatively, "state action" may be found to exist where the state "has exercised coercive power or has provided significant encouragement" so that the

private choice may be deemed to be effectively that of the state (*Blum* v. *Yaretsky, supra*, p 1004; *see Flagg Bros.* v. *Brooks*, 436 US 149, 166). What is made absolutely clear by the case law, however, is that the state's mere acquiescence in the conduct of a regulated private entity does not transform an essentially private choice into a governmental action (*Blum* v. *Yaretsky, supra*, pp 1004-1005; *Jackson* v. *Metropolitan Edison Co., supra*, p 357; *see Montalvo* v. *Consolidated Edison Co.*, 92 AD2d 389, *affd on opn below* 61 NY2d 810).

In this case, petitioner argues that the charitable contribution pass-along has the earmarks of state action because the combination of the state's intensive involvement in rate-setting and the utilities' status as franchised monopoly providers results in his having to make forced contributions under the state's sponsorship. In this respect, however, petitioner's argument is no different in substance from that made by the dissenters and explicitly rejected by the majority in *Jackson* v. *Metropolitan Edison Co.* (*supra*, pp 351-352, 360-364 [Douglas, J., dissenting], pp 366-373 [Marshall, J., dissenting]). Indeed, the majority's conclusion that "the combined effect of the utility's monopoly status and the rate order is no less coercive than the threat of employment loss in *Abood*" is virtually indistinguishable from Justice Douglas' argument that state action should be found to exist because "in the aggregate" such factors as Metropolitan Edison's state authorized monopoly, its unilateral control over an essential public service and the "framework of extensive state supervision and control" warranted that conclusion (*id.*, pp 361-362 [Douglas, J., dissenting]). While it is true that, as a practical matter, the utilities' monopolistic status gives them a power to coerce that is equal in some respects to the coercive power of government, that circumstance alone does not transform what has traditionally been a private activity into a governmental one. Accordingly, although the coercion present in *Abood* is analogous to the coer-

cion present here, the fact remains that in this case, unlike in *Abood*, the coercion is an unfortunate by-product of private, not state, action.

Further, the fact that the PSC plays a vital role in the rate-setting process does not render the billing practices of the utilities the equivalent of "state action." The PSC was created by the Legislature to oversee utilities precisely because their monopoly status would otherwise enable them to engage unfettered in rate-setting and other practices inimical to the public welfare. Having undertaken to regulate utilities, however, the State did not thereby become the initiator of the utilities' actions.

It is true that providers of gas, electric and telephone services are not permitted to charge more than the PSC permits (*see* Public Service Law §§ 65[1], 91[1]), and once the permissible rates are established, the utilities are not free to charge their customers *less* (Public Service Law §§ 66[12], 92[2]). However, the process by which those rates are established amply demonstrates that it is the utility, and not the PSC, which is the initiator of the disputed pass-along decision. As described in the PSC's brief, the process consists, in simplified form, of the utility's submitting a schedule of "revenue requirements" calculated on the basis of anticipated operating expenses. The PSC reviews these schedules and determines which items of projected expenses should be disallowed. The remaining "revenue requirements" then become the basis of the rates the utilities' customers pay. Manifestly, these are charges in which the PSC has, in the truest sense of the word, merely "acquiesced" by failing to disallow them. When examined closely, petitioner's claim amounts to nothing more than a contention that the state has refused to interfere with the utilities' decisions to pass along their charitable contribution costs to their customers, the ratepayers. There is no allegation that the PSC has compelled this activity, and, indeed, there could be none. Nor can there be any colorable claim that the activity by which

petitioner feels himself aggrieved is, overtly or covertly, coerced by the state, since it is virtually inconceivable that coercive powers of the government would be necessary to induce private concerns such as the utilities involved in this case to pass along their costs rather than absorbing those costs themselves.

Indeed, the key to analysis in a case such as this is to subtract the government from the equation and then consider what the behavior of the private entity would be without any governmental intervention at all. As the Supreme Court has stated, "[t]he nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval" (*Jackson* v. *Metropolitan Edison Co.*, *supra*, p 357). Here, if the regulatory powers of the state were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they might choose to make.[3] By allowing these utilities to engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no state involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision.[4]

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[3] Contrary to the majority's assertion (slip op. pp. 5-6), we do not advance the PSC's noninvolvement in rate-setting as a "valid proposition" that requires "support in law or fact." Rather, we merely posit that noninvolvement hypothetically, as a means of demonstrating that, despite the majority's suggestion to the contrary (slip op. pp. 7-8), the utilities' power to charge rates for their services is not derived from the PSC, but rather is a natural incident of their status as owners of those services.

[4] To the extent that private business concerns choose to make such donations out of their profits, it may be that they do so because of their belief that the market will not tolerate an increased price for their goods or services. Of course, utilities generally do not need to make such sensitive price calibrations, since their services are public necessities and the consumer simply cannot take

To be sure, one of the motivating factors behind the PSC's change in policy may well have been a desire to spur utilities to make charitable donations and thereby contribute to the public welfare (*see New York Telephone Company, supra*, pp 349-350). This underlying intention, however, does not constitute the type of "significant encouragement" that will convert the private decision at issue here into a governmental one (*cf. Blum* v. *Yaretsky*, *supra*, pp 1008-1009 n 19). Indeed, while the PSC may have intended to encourage private contribution, an activity which is itself unobjectionable, it has done nothing affirmatively to encourage the utilities to pass along the attendant costs to their customers. Again, that is a decision which the PSC has merely approved or, more specifically, failed to interdict.

We note in closing that there is no allegation, in either the pleadings or the papers submitted on the dismissal motion, that the PSC has actually engaged in a qualitative review of the donees the utilities select as the objects of their generosity.[5] In contrast, the PSC has asserted that it has never required utilities to make charitable contributions or to select particular organizations for the contributions they choose to make. Further, the PSC has alleged that it has never interfered with a utility's choice of donees, although in 1970 it indicated that it might do so. Had it done so, our disagreement with the majority might not have been as acute.

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his business elsewhere. Thus, to a large extent, utilities are free, in the absence of regulation, to pass along many types of business expenditures that other corporations would elect to absorb. This circumstance, however, is a by-product of utilities' status as monopolies, and not a result of any governmental intervention.

[5] Although Special Term indicated that petitioner had made such allegations, our own review of the papers does not bear out this conclusion. Indeed, in the briefs petitioner submitted in response to the dismissal motion, he acknowledged that the "recipients are selected solely at the discretion of the utility" and that "it is the express policy of the PSC not to regulate or screen the contributions or their recipients."

In sum, it is evident that the PSC is not the source of petitioner's grievance and, consequently, we cannot agree that his rights under the First and Fourteenth Amendments have been violated. While the PSC has the power to, and in fact has in the past, forbid the practice to which petitioner objects, its refusal to exercise its authority in that manner now does not imbue the utilities' conduct with the characteristics of "state action." Thus, while reasonable minds may differ as to the wisdom of the PSC's policy of nonintervention in this area, it cannot be said that federal constitutional rights are implicated. Inasmuch as we are bound by Supreme Court precedent in interpreting the federal Constitution, we can reach no other conclusion than that the petitioner's proper remedy, if remedy there should be, rests with the Legislature, which has the authority to direct the PSC in the use of its regulatory powers (*see, e.g.*, Public Service Law § 91[2][b]).

Accordingly, we would reverse the order of the Appellate Division and dismiss the petition in its entirety.

APPENDIX E.

Supreme Court — Appellate Division
Third Judicial Department

Decided:
January 23, 1986 50760

In the Matter of Joseph Cahill,
Respondent,

v.

Public Service Commission, et al.,
Appellants,
and Central Hudson Gas and
Electric Corporation,
Intervenor-Appellant.

OPINION

Before:
HON. ROBERT G. MAIN,
Justice Presiding,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices.

APPEAL, by permission, from an order of the Supreme Court at Special Term (LAWRENCE E. KAHN, J.), entered June 12, 1985 in Albany County, which, in a proceeding pursuant to CPLR article 70, denied respondents' motions to dismiss the petition.

DAVID E. BLABEY, Counsel, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, for Public Service Commission, appellant.

GERALD OSCAR (John M. Clarke of counsel), New York Telephone Company, 1095 Avenue of the Americas, New York, New York 10036, for New York Telephone Company, appellant.

GOULD & WILKIE (Charles S. Biener of counsel), One Wall Street, New York, New York 10005, for Central Hudson Gas and Electric Company, intervenor-appellant.

RICHARD EMERY, American Civil Liberties Union, 84 Fifth Avenue, New York, New York 10011, for respondent.

HARVEY, J.

Petitioner is a customer of both respondent New York Telephone Company and intervenor Central Hudson Gas & Electric Corporation. In October 1984, he commenced the instant CPLR article 78 proceeding seeking an order directing respondents to cease the practice of passing along the cost of charitable contributions to customers. Petitioner also sought an order amending respondent Public Service Commission's (PSC) June 22, 1984 rate order to eliminate the PSC's recognition and authorization of New York Telephone's practice of passing along the cost of its charitable contributions to its customers as part of the rates it was authorized to charge.

Respondents elected not to interpose an answer, but rather moved for dismissal of the article 78 petition asserting objections in point of law (CPLR 7804[f]). Respondents asserted that the court lacked jurisdiction since the subject matter raised was within the exclusive purview of the PSC. Respondents also asserted that petitioner failed to exhaust administrative remedies and that the petition, which was predicated on a viola-

tion of petitioner's rights as set forth in the 1st and 14th Amendments of the US Constitution, failed to state a cause of action.

Special Term denied respondents' motion in all respects. That court properly noted its jurisdiction to entertain an article 78 proceeding which raises claims of a violation of constitutional rights as a consequence of actions taken by public regulatory bodies (*see, Consolidated Edison Co.* v. *Public Serv. Commn.*, 447 US 530, 533; *see also, Matter of Consolidated Edison Co. of N.Y.* v. *Public Serv. Commn. of State of N.Y.*, 107 AD2d 73).

Respondents contended as one of their objections in point of law that petitioner failed to state a cause of action for article 78 relief. Since respondents elected not to submit an answer prior to moving for dismissal of the petition by setting forth objections in point of law as provided for in CPLR 7804(f), their motion is one in the form of a CPLR 3211 motion addressed to the pleadings (*see, Matter of Nassau BOCES Cent. Council of Teachers* v. *Board of Coop. Educational Servs. of Nassau Co.*, 63 NY2d 100, 102-103; McLaughlin, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C7804:7, p 507). Examining the petition and accepting the facts alleged as true, and considering them in the light most favorable to petitioner, as we must, we find that the article 78 petition states a claim for relief (*see, Matter of Board of Educ., City School Dist., City of Mt. Vernon* v. *Allen*, 32 AD2d 985).

It is essential to the survival of this proceeding that the petition allege a violation of petitioner's 1st Amendment rights by some "state action." For, while the 14th Amendment provides protection of a citizen's constitutional rights from encroachment by state government action, it has no applicability to private discriminatory or wrongful conduct (*Jackson* v. *Metropolitan Edison Co.*, 419 US 345, 349-350). Petitioner states that the PSC established a policy in 1970 which permitted the

utilities it regulates to pass along the cost of charitable donations to ratepayers. The PSC's "prime function * * * as a regulatory body, is [in separating] those costs which should be borne by ratepayers from those which are properly chargeable to shareholders" (*Rochester Gas & Elec. Corp.* v. *Public Serv. Comm.*, 51 NY2d 823, 825, *appeal dismissed* 450 US 961). The PSC is a creation of the Legislature (Public Service Law §§ 3, 4; *see, Matter of Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm. of State of N.Y.*, 47 NY2d 94, 102, *revd* 447 US 530). By alleging that the PSC adopted a policy which permitted the costs of charitable donations to be passed along to ratepayers, petitioner has adequately stated the threshold claim of "state action" (*Jackson* v. *Metropolitan Edison Co.*, *supra*, pp 349-350).

Petitioner goes on to allege in the article 78 petition that the policy promulgated by the PSC results in ratepayers' funds being directed to a variety of charitable causes without any notice to, or input by, those individuals. Petitioner also contends that donations made to specific charities are violative of his religious beliefs. Petitioner's claim for relief is that the PSC's policy constitutes unlawful state action since it has the end result of compelling an individual ratepayer to indirectly support an organization whose philosophy the ratepayer opposes on religious or other personal grounds. Accepting petitioner's allegations and construing them in his favor, we find that he has stated a cause of action which alleges a violation of his rights under the 1st and 14th Amendments of the US Constitution (*Torcaso* v. *Watkins*, 367 US 488; *see, Wooley* v. *Maynard*, 430 US 705; *see also, Abood* v. *Detroit Bd. of Educ.*, 431 US 209).

Respondents' contention that petitioner has failed to exhaust his administrative remedies does not present a bar to the court's entertaining the instant petition. Where, as here, a petitioner's claim is based solely on a constitutional challenge, the exhaus-

tion of administrative remedies requirement is inapplicable (*Matter of Emery* v. *Lefevre*, 97 AD2d 931, 932). The proceeding is timely since the nature of the relief sought by petitioner is to address an alleged continuing violation of his constitutional rights (*see, Matter of Burke* v. *Sugarman*, 35 NY2d 39, 45).

LEVINE, J. (dissenting).

In our view, under current state-action principles applied by the United States Supreme Court (*see, Blum* v. *Yaretsky*, 457 US 991; *Rendell-Baker* v. *Kohn*, 457 US 830; *Flagg Brothers* v. *Brooks*, 436 US 149; *Jackson* v. *Metropolitan Edison Co.*, 419 US 345), petitioner has failed to plead any violation of his 1st Amendment rights on the part of respondent Public Service Commission (PSC). State-action analysis begins with "careful attention to the gravamen of the plaintiff's complaint" (*Blum* v. *Yaretsky, supra*, p 1003). The gravamen of the complaint in the instant case is found in paragraphs 7, 8 and 9 of the petition. The constitutional deprivation complained of is that petitioner is being "compelled to support * * * charities * * * by means of including coerced contributions in his utility bills" (par 7); that the PSC "*permits* the New York Telephone Company and all New York utilities which it regulates to dispose of their charitable contributions extracted from their customers in any manner each utility determines without any protection for the interests of the customers" (par 8) (emphasis supplied); and petitioner "has no alternative means of obtaining the basic utility services the New York Telephone Company provides him in his own geographic area" (par 9).

Nowhere in the foregoing key allegations, nor elsewhere in the petition, are facts pleaded which attribute the claimed constitutional deprivation to the PSC other than indirectly through

its purely regulatory authority over respondent New York Telephone Company (NYT). Any invasion of petitioner's 1st Amendment rights directly results from the acts of NYT, a private corporation. It is NYT, and not the PSC, that adds the proportionate share of the cost of its charitable donations to petitioner's telephone bill and threatens petitioner with discontinuance of service if the bill is not paid in full. This being the case, to establish the requisite State action on the basis of NYT's acts, there must be found "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" (*Jackson* v. *Metropolitan Edison Co., supra*, p 351). Detailed inquiry may be required as to the true nature of the State's involvement (*id.*).

The Supreme Court has rather precisely enunciated the test for state action when the constitutional challenge is made to the decisions or the acts of a private entity. A state normally can be held responsible "only when it has *exercised coercive power* or has provided such *significant encouragement*, either overt or covert", that the act or decision is deemed that of the state itself; "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient" (*Blum* v. *Yaretsky, supra*, p 1004) (emphasis supplied). The only other identified instance of imputing to a state the results of private initiative is when the private entity exercises powers that are " 'traditionally the exclusive prerogative of the State' " (*id.* at 1005, quoting *Jackson* v. *Metropolitan Edison Co., supra*, p 353).

The petition and other papers submitted at Special Term simply did not meet the foregoing requirements for attributing NYT's acts to the PSC. The record is devoid of anything but conclusory allegations of the PSC's overt or covert encouragement to NYT's charges of which petitioner complains. The PSC's policy, announced in a 1970 ruling permitting utilities to include charitable contributions as a legitimate operating

expense, is entirely neutral on the issue. It merely recognizes the modern reality of corporate life that it is good business for corporate citizens (utilities included) to support charitable causes in the communities where they exist and operate. The 1970 ruling expressly disclaimed any screening function in approving charitable contributions as a utility-operating expense except as to whether such contributions are truly eleemosynary. Petitioner has not set forth any factual basis suggesting that the PSC has deviated from that position in the 15 years that the policy has been in effect. Demonstrative of the absence of any overt or covert encouragement is the fact that the PSC has limited its approval to pre-1970 utility contribution levels, adjusted for inflation. Such unaligned approval of or acquiescence in the utility practice of making charitable donations and then passing them on to customers is insufficient to hold the State responsible (*Blum* v. *Yaretsky*, 457 US 991, 1004-1005, *supra*). The fact that approval of the challenged act of NYT by the PSC initially took the form of a general policy statement in 1970 does not support any inference of State encouragement. Even express statutory authorization of a private act does not convert such conduct into state action (*Flagg Brothers* v. *Brooks*, 436 US 149, 165, *supra*).*

Nor has petitioner pleaded any facts or otherwise shown that the PSC has itself exercised any coercive power to exact a share of NYT's philanthropies from him. As previously discussed, the PSC does not mandate the making of contributions and does not require any utility to file a proposed rate tariff which includes such contributions as a recoverable operating expense. No rule, regulation or practice has been cited by petitioner to support any inference that the PSC would *require* termination of telephone service were a subscriber to deduct

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*To the extent that *Public Utilities Commn.* v. *Polak* (343 US 451) may have held to the contrary, its precedential value has been virtually eliminated by *Jackson* v. *Metropolitan Edison Co.* (419 US 345, 356, *supra*).

from his utility bill the portion thereof attributable to such contributions.

Similarly unavailing is petitioner's reliance on NYT's monopoly position in providing telephone service, a function heavily affecting the interest of the public. This ground for attributing the conduct of a public utility to a state was expressly rejected in *Jackson* v. *Metropolitan Edison Co.*, 419 US 345, 351-352, *supra*), which also held that the furnishing of utility service is not a function traditionally the exclusive prerogative of a state (*id.* at 353).

In short, the instant case falls squarely under *Blum* and *Jackson*. In essence, they hold that the requisite nexus between the challenged act or decision of a private entity and a state is not established merely because (1) the entity is heavily regulated, (2) its market position is enhanced by state regulation, and (3) a state regulatory agency has authority to prevent the conduct complained of. Nothing more has been shown here.

Contrary to petitioner's contention, *Abood* v. *Detroit Board of Education* (431 US 209) does not support the opposite conclusion. In *Abood*, the Supreme Court struck a Michigan labor statute sanctioning an "agency shop" contract requiring nonunion member employees to pay a service fee equivalent to union dues as a condition of employment, insofar as such fees may be applied to fund political activities of the union. *Abood* is quite distinguishable. First, *Abood* notes that such an agency or union shop contract is an integral element of an express legislative policy to foster exclusive representation of employees in the collective bargaining process (*id.* at 220-222). Here, as has already been discussed, the PSC's policy is neutral as to the challenged action of NYT. Secondly, as the state-action discussion in *Abood* explains (*id.* at 218, n 12), it is only by virtue of legislative approval that such agency shop arrangements are enforceable. In the instant case, the PSC's power to prevent the charging of customers for the utilities' donations

is totally derived from the PSC's general, rate-setting authority. Without that regulatory control, NYT, like any other private corporation, would be free to pass on its charitable expenses as a cost of doing business. Finally, once the agency shop contract in *Abood* was entered into, Michigan law *mandated* the employer to discharge any nonunion employee who refused to pay the service fee, and a third party (the union) was given the right to enlist the coercive power of the State to enforce that obligation on the part of the employer. No such coercive power, either to mandate NYT's imposition of the challenged charges or to terminate petitioner's telephone service for nonpayment thereof, has been pleaded here.

For all the foregoing reasons, Special Term's order should be reversed and the petition dismissed.

Opinion by HARVEY, J., in which MAIN, J.P., and YESAWICH, J.R., J., concur; MIKOLL and LEVINE, JJ., dissent and vote to reverse in an opinion by LEVINE, J.

Order affirmed, with costs.

APPENDIX F.

State of New York Supreme Court
County of Albany

JOSEPH CAHILL,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD; and ROSEMARY S. POOLER,
Respondents.

Supreme Court, Albany County Special Term
Calendar Nos. 2, 46, 47, 52 & 55
Decided: May 14, 1985
JUSTICE LAWRENCE E. KAHN, Presiding

APPEARANCES:

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KAHN, J.

In the above-captioned Article 78 proceeding, petitioner seeks to require the respondent, Public Service Commission (PSC), to abandon its policy of permitting public utilities to include charitable contributions as authorized expenditures in establishing utility rates. The instant litigation challenges the PSC's policy upon the narrow issue that it violates petitioner's First Amendment right of free expression and freedom of religion. The court has granted prior motions to add New York Telephone Company (Company) as a necessary party and further, to permit intervention by Central Hudson Gas & Electric

Corporation. No answer has been served. All respondents have moved to dismiss the petition on various grounds, including lack of subject matter jurisdiction, statute of limitations, and failure to exhaust administrative remedies.

Initially, it is clear that this court has subject matter jurisdiction to render a determination on the merits of petitioner's allegations, and that the doctrine of exhaustion of administrative remedies is not a bar to the present litigation. Relief is sought in the nature of mandamus vis-a-vis the PSC. Petitioner seeks no relief against any specific utility, but rather, challenges a policy of the PSC which has been in effect since 1970. As such, there is no special expertise which would necessitate that this court defer to an administrative agency for a resolution of the dispute. Rather, resolution of the issue is grounded in constitutional considerations and thus certainly within the purview of this court. Similarly, a determination on the merits need not be avoided by dismissal for failure to exhaust administrative remedies. Petitioner raises only constitutional issues, and seeks no monetary relief. The submissions before the court are replete with reference to the PSC's continuing adherence to the principle that inclusion of charitable contributions in operating expenses of a utility is acceptable for rate-making purposes. The policy was first articulated in Case 25155, July 1, 1970, and repeated in the latest rate-making determination which is the subject of this challenge (Case 228601). While there have been various individual objections from within the PSC concerning this policy, and introduction of proposed legislation to alter it, such a result has never been achieved. Given these realities, and the limitation of this litigation to constitutional claims, a dismissal for failure to exhaust administrative remedies would be the supreme example of invoking form over substance (*Matter of First Nat. City Bank* v. *City of New York*, 36 NY2d 87; *Usen* v. *Sippress*, 41 AD2d 251).

Finally, respondents seek dismissal premised upon petitioner's failure to state a cause of action under either the First or Fourteenth Amendment to the United States Constitution. In resolving this issue, it has long been recognized that "if a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated and no motion lies . . . ." (*Foley* v. *D'Agostino*, 21 AD2d 60, 65.) The test is two-fold. The pleading must give notice of the transactions relied upon and assert sufficient material elements to constitute a cause of action (*Jerry* v. *Bordon Co.*, 45 AD2d 344). Petitioners are to be afforded the benefit of every possible favorable inference (*Rovello* v. *Orofino Realty Co.*, 40 NY2d 633).

While respondents have not yet answered, apparently the PSC allows inclusion of charitable donations as a cost of doing business in establishing rate structures for public utilities. This policy has existed since 1970. The amount is established pursuant to a formula premised upon pre-1970 corporate charitable donations, trended forward with an inflation factor. On or about June 22, 1984, the PSC, in determining a rate request for New York Telephone, allowed inclusion of charitable donations for 1984 in the sum of approximately $3,000,000. Petitioner alleges that he is a practicing Catholic and objects to funding of charities which support the right to an abortion. He further asserts that the above denies him the rights of free expression and free exercise of religion, and most importantly, that the activities of the PSC constitute "state action" within the purview of 42 U.S.C., section 1983, and as such, violate his aforesaid First Amendment guarantees.

Petitioner relies upon *Abood* v. *Detroit Board of Education*, (431 U.S. 209), for the proposition that the policy of the PSC constitutes "state action." Quoting Thomas Jefferson, the *Abood* court reiterated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." (p 235.) While this court

is enthusiastic in its endorsement of such a philosophy, nevertheless, it is applicable to the case at bar only if petitioner actually establishes that "state action" is present. State action "is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the acts complained of (see: *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351)." (*Karp* v. *Consolidated Edison Co.*, (New York County Special Term, May 24, 1984, Calendar Nos. 71 & 151.)

The philosophy of corporate charitable contributions is rooted in the notion that a business should be an integral part of the community and benefits when it helps bolster the quality of life in the area it serves. Such contributions tend to enhance customer relations and attitudes. Section 202(a)(12) of the Business Corporation Law expressly provides that a corporation has the power "to make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof."

The PSC's motion to dismiss is supported by affidavits asserting that it does not compel contributions, nor does it designate a particular charity or the exact amount of any contribution. However, the petition alleges the converse and that while the PSC may not actively participate in determining a utility's choice of charities in the first instance, this does not negate the presence of state action. Petitioner asserts that, in fact, each rate-making determination which approves a proposed charitable contribution must be viewed as a determination by the PSC, that the contribution is allowable as "relevant to the civic responsibilities of the public utility" and not "demonstratively imprudent." As aforesaid, in 1970, the PSC determined for the first time to allow charitable contributions to be included as a necessary operating expense. "We are prepared to examine

carefully claims for charitable contributions . . . and if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely. The level of contributions during the period in which they were not considered allowable expenses will serve as benchmark for the future." Thus, the PSC's reservation of authority is two-fold. It reserves the right to determine the *amount* of appropriate corporate contributions. It also reserves control of the *specific contribution*, approving only those which it deems relevant to the utility's civic responsibilities. Subsequently, it has also articulated a standard for disallowing charities which are "demonstratively imprudent."

"[A]cts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found in the 'state' acts, than will the acts of an entity lacking these characteristics . . . the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of a regulated entity so that the action of the latter may be fairly treated as that of the state itself." (*Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351.) State action is present in each instance where the PSC applies its "relevant civic responsibility" test during the rate-making process. In such instances, the PSC is not merely affording a utility the choice of making a charitable contribution, but more significantly, and thereby creating a significant nexus, it is determining those charities which *it* feels comes within the standards which *it has set* for acceptable charitable giving. Thus, the PSC is not merely acquiescing in an otherwise acceptable business practice, but is engaged in an active supervisory role on a continuing basis.

The petitioner alleges that respondents approve funding of charities who support practices which are violative of his religious beliefs. Assuming the truth of this allegation, as the

court must at this stage of the litigation, it becomes apparent that such activity by the state would be prohibited by guarantees contained in the First Amendment of the United States Constitution. As such, the petition states a cause of action, thereby requiring denial of respondents' motion.

The motion to dismiss the petition upon the ground of lack of subject matter jurisdiction, failure to exhaust administrative remedies, that the proceeding is barred by the applicable statute of limitations, and that the petition fails to state a cause of action, shall be denied. All papers to attorney for petitioner, who shall submit an order in conformance herewith, with a copy of this decision annexed thereto. Respondents shall be granted twenty (20) days in which to serve an answer. Thereafter, petitioner may renotice this proceeding on ten (10) days notice at any subsequent appropriate Special Term.

DATED: May 14, 1985
Albany, New York

APPENDIX G.

SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

JOSEPH CAHILL,
Petitioner,

–against–

THE PUBLIC SERVICE COMMISSION: PETER BRADFORD: HAROLD A. JERRY, JR.; GAIL GARFIELD SCHWARTZ; ELIA M. NOAM; JAMES T. McFARLAND; HENRY G. WILLIAMS; EDWARD M. KRESKY: NEW YORK TELEPHONE COMPANY,
Respondents,

–against–

CENTRAL HUDSON GAS & ELECTRIC CORP.,
Intervenor-Respondent.

VERFIED PETITION PURSUANT TO ARTICLE 78, C.P.L.R. TO REQUIRE RESPONDENT PUBLIC SERVICE COMMISSION TO TERMINATE ITS POLICY OF SETTING UTILITY RATES WHICH REQUIRE CUSTOMERS TO PAY FOR CHARTABLE CONTRIBUTIONS MADE BY UTILITY CUSTOMERS

Index No. 12464-84

PRELIMINARY STATEMENT

1. The New York State Public Service Commission has a well-established policy of setting rates for utilities that it regulates so that as part of rate recovery in rate charges to customers, donations to religious and other charitable organizations are collected from the customers. Customers are not given any choice to determine the recipients of these donations under Respondents' policy. Peti-

tioner challenges this policy solely on the ground that it violates his First Amendment rights of free expression, free exercise of religion and against establishment of religion. He seeks an order precluding future implement [*sic*] of this policy.

PARTIES

2. Petitioner Joseph Cahill is a 63-year old United States citizen who is a resident of Dutchess County. Petitioner has lived in the town of Fishkill for the past 25 years and was an IBM project manager prior to his retirement which resulted from a disability. Petitioner Cahill is a practicing Roman Catholic.

3. The Respondents are the New York Public Service Commission and its members and are proceeded against here only in their capacity as policy-makers and only insofar as they are directly responsible for the policy challenged by the Petitioner. The Respondents' duties include fixing rates for all public utilities in New York State and as such it is their policy to pass on the cost of charitable donations by the utilities to the customers rather than to require the stockholders of these utilities to bear the burden of charitable donations. The Respondents' policy does not provide any opportunity for customers who object to the recipients of these donations to withhold or otherwise indirect [*sic*] such donations.

FACTUAL ASSERTIONS

4. Prior to 1970, the Respondents did not include charitable donations as a cost of doing business in fixing the rate structures of New York State public utilities. Beginning in 1970, however, in Rate Case # 25155 this policy changed and Respondents have consistently set rates which include rate recovery

for charitable donations in accordance with their policy as described in paragraph 3 and the proposed tariffs submitted by the utilities in the rate setting process.

5. The amount of charitable donations included in rates set for each utility by the Respondents is determined pursuant to a formula based upon the rate of inflation and the charitable donations made by each utility prior to the 1970 implementation of Respondents' policy of setting rates which include a charge to customers for utilitys charitable donations.

6. On June 22, 1984, in Case # 228601 Respondents specifically set the rates for New York Telephone Company charges to customers, one of whom is Petitioner, to include the charitable donations of New York Telephone Company at approximately $3,000,000.00 in 1984. That determination became final on October 10, 1984. Thereby, Respondents set rates for New York Telephone Company which included rate recovery for charitable donations to several thousand charities. Among these are several which either are themselves, or support, religious institutions of faiths which expound beliefs inconsistent with the Petitioner's belief and practice of Catholicism. Also, among these charities are several which support the right to an abortion to which Petitioner objects on moral and religious grounds. And, finally, among these charities there are several which support activities and causes to which Petitioner objects on political or personal grounds.

7. Petitioner objects as a matter of principle to being compelled to support these charities in particular, and all charities in general, by means of including coerced contributions in his utility bills no matter how small a portion his bill [*sic*] is affected by Respondents' policy. Petitioner has never been informed either by Respondents or by the utilities which serve him of the fact that a portion of his utility payments are being diverted to charities. Further, Petitioner has never been informed of the specific charities to which this portion of his

payments are being diverted. Finally, Respondents have failed to adopt any procedure which would allow Petitioner to withhold his contribution or redirect his contribution to organizations to which he does not object.

8. Respondent permits the New York Telephone Company and all New York utilities which it regulates to dispose of their charitable contributions extracted from their customers in any manner each utility determines without any protection for the interests or objections of the customers.

9. Plaintiff has no alternative means of obtaining the basic utility services which the New York Telephone Company provides him in his home geographic area.

10. No previous application for the same or similar relief has been made except that an action in the Southern District of New York was filed on August 1, 1984, and subsequently dismissed upon the stipulation of the parties because the federal courts lack jurisdiction over challenges to rate orders under 28 U.S.C. Sec. 1342.

CAUSE OF ACTION

11. Based upon paragraphs 1-10 above, the Respondents have denied Petitioner the rights to free expression and free exercise of religion as well as against establishment of religion under the First Amendment of the United States Constitution.

WHEREFORE, the Petitioner respectfully prays that this Court:

a) Enter an order directing the Respondents to adopt a policy of setting utility rates which eliminates the practice of charging utility customers for the charitable contributions made by utilities;

b) Enter an order vacating the Respondents' rate order of June 22, 1984 with the direction that such rate order be amended to set rates which eliminate charges to New York

Telephone Company customers for the charitable contributions which that utility makes;

c) Enter an award of attorneys' fees and costs in favor of the Petitioner pursuant to 42 U.S.C. Sec. 1988;

d) Grant such other relief as the Court deems necessary and appropriate.

Dated:
NEW YORK, NEW YORK
December 15, 1987

/s/_____

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APPENDIX H.

THE PUBLIC SERVICE COMMISSION

July 1, 1970

New York Telephone Co.

Case 25155*

Commissioners present:

JOSEPH C. SWIDLER, *Chairman*
EDWARD P. LARKIN (Dissenting in separate opinion)
JOHN T. RYAN
WILLIAM F. WALSH

Proceeding on motion of the Commission as to the rates, charges, rules, regulations and classifications of the New York Telephone Company.

* * * * *

Charitable Contributions

NYT deducted as an operating expense an amount of $901,315 expended during the test year as charitable contributions. Of this amount, more than one-half, $467,254, was made to the United Appeal and Red Cross. The balance was made up of donations to hospitals, educational institutions, and other charitable, social, and community welfare organizations. NYT contends that it and its employees benefit directly from the activities of the beneficiaries of its contributions and that it should be permitted to treat these expenditures as operating expenses for ratemaking purposes, as it does for Federal income tax purposes. In the past, this Commission has not permitted regulated utilities to include charitable contributions as an operating expense on the ground they are not necessary

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* *Editor's note*: Also reported in 84 PUR 3d 321.

to the conduct of the business and that they are made at the sole discretion of Company officers to donees of their choosing. The proposed report, while making clear that the organizations to which the contributions had been made were worthy of support, disallowed the charitable deductions as an authorized expense on the basis of Commission precedent.

The Federal Government permits charitable contributions by a corporation to be deducted for tax purposes. As a result, the actual cost to the Company's customers is approximately one-half of the amount of the contributions. The Company, in protesting the disallowance, points out that the Illinois Commerce Commission has accepted charitable contributions as a proper operating expense.[22] The Federal Power Commission also has allowed such contributions to be included in the cost of services, stating:[23]

> ". . . We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Corporations throughout the country have come to realize that charitable contributions are no longer wholly voluntary. Most charities could not function were it not for corporate contributions, and the corporations themselves, recognizing their role in the communities in which they operate and their public interest obligations to these communities, have supplied charities with a large share of the funds needed to carry on their

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[22] *Vrtjack v. Ill. Telephone Co.*, 32 PUR 3d 385, 387-388 (1959).
[23] *United Gas Pipe Line Co.*, 31 FPC 1180, 1189; 54 PUR 3d 285, 295 (1964).

necessary community activities. We believe it is time that this Commission reconsidered its past position with regard to charitable contributions by utilities and, on such reconsideration, we conclude that the contributions made by NYT and reflected in this proceeding should be allowed as a proper operating expense.* We have examined the individual items and find that the Company has exercised prudence both as to the recipients of its contributions and in the amounts donated. We are prepared to examine carefully claims for charitable contributions by other public utilities and to recognize similar donations in a "reasonable amount." However, we emphasize that it is not our function to screen lists of contributions to pick out the good from the bad, and if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely. The level of contributions during the period in which they were not considered allowable expenses will serve as a benchmark for the future.

* * * * *

* *Editor's note*: See interim report, Feb. 11, 1970, p. 88.

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No. 90-255

FILED
OCT 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY and
ROCHESTER GAS AND ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL and
ROBERT ABRAMS, ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The New York Public Service Commission ("PSC") is charged with plenary regulatory and rate-fixing powers over all public utilities in New York State. (A2)* N.Y. Public Service Law §§ 66 (12), 91(1), 97(1). The PSC has the exclusive authority to determine just and reasonable rates, and no utility may charge more or less than the rates established by the PSC. (A33) Until 1970, the PSC did not allow utilities to recoup from ratepayers the cost of their charitable contributions. (A2) In 1970, the PSC reversed its previous policy, explaining its decision as one intended to

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* Citations in this form are to the Appendix to the Petition for Writ of Certiorari.

benefit charities:

> Most charities could not function were it not for corporate contributions, and the corporations themselves, recognizing their role in the communities in which they operate and their public interest obligations to these communities, have supplied charities with a large share of the funds needed to carry on their necessary community activities.

N.Y. Telephone Case, #25155 (1970) (A67-68). In keeping with the 1970 policy, the PSC had, until recently, permitted New York utilities to recoup from their ratepayers contributions to politically active organizations devoted exclusively to social, political and economic change, such as the National Organization for Women Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the American Jewish Congress, One Hundred Black Men, National Urban League and

the NAACP of Yonkers (JA 706-07)*; churches (JA 469, 693); a range of church-related institutions in many states outside of New York (JA 696-99); institutions apparently primarily for the purpose of promoting religion, such as Religion in American Life Inc. and the Council of Churches of the City of New York (JA 707); the arts and culture (JA 469-71, 701); and public broadcasters, including Institutional Television of the Archdiocese of New York (JA 700) and the Diocese of Rockville Educational Television (JA 704).

Petitioners do not dispute that, under the PSC policy, they had charged ratepayers for charitable contributions to institutions that

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* Citations in this form are to the Joint Appendix filed below in the New York State Court of Appeals.

perform abortions and support the right to abortion. (JA 540-41)

The courts of numerous states have long held that the cost of charitable contributions of regulated utility monopolies cannot lawfully be charged to utility ratepayers, but must be borne by the utility stockholders. See, e.g., Cleveland Elec. Illuminating Co. v. PUC of Ohio, 69 Ohio 2d 258, 431 N.E.2d 683 (Ohio S.Ct. 1982); Southern Bell Tel. & Tel. Co. v. Florida PSC, 443 So.2d 92 (Fla. S.Ct. 1983); Mississippi ex rel. Alain v. Mississippi PSC, 435 So.2d 608 (Miss. S.Ct. 1983); Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583 (Iowa S.Ct. 1971); Jewell v. Washington UTC, 585 P.2d 1167 (Wash. S.Ct. 1978); Pacific Tel. & Tel. Co. v.

PUC, 401 P.2d 353 (Cal. S.Ct. 1965); New England Tel. & Tel. Co. v. PUC 390 A.2d 8, (Maine S.Ct. 1978); Oklahoma v. Oklahoma Gas and Elec. Co., 536 P.2d 887 (Okl. S.Ct. 1975); Boston Gas Co. v. Department of Public Utils., 539 N.E.2d 1001 (Mass. SJC 1989); New Jersey Bell Tel. Co. v. Department of Public Utils., 97 A.2d 602 (N.J. S.Ct. 1953); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 303 N.E.2d 364 (Ill. S.Ct. 1973); State ex rel. LaClede Gas Co. v. PSC, 600 S.W.2d 222, 229 (Mo. 1980), app. dismissed, 449 U.S. 1072 (1981); South Central Bell Tel Co. v. PSC, 702 S.W.2d 447 (Ct. App. Ky. 1985); Chesapeake & Potomac

Tel. Co. v. PSC, 187 A.2d 475 (Ct. App. Md. 1963); Washington Gas Light Co. v. PSC, 450 A.2d 1187 (Ct. App. D.C. 1982); Re Mountain States Tel. & Tel. Co., 78 P.U.R.3d 429 (Utah PSC 1969); Re Southern New England Tel. Co., 78 P.U.R.3d 504 (Conn. PUC 1969); Re Mountain States Tel & Tel. Co., 22 P.U.R.4th 516 (Col. PSC 1977).*

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* Petitioners contend that 22 states allow the charitable contributions of utilities to be included in the charges to ratepayers. (Pet. at 2). That claim is misleading. At least four of the decisions cited by petitioners (at 2 n.1) actually hold the opposite, disallowing the inclusion of charitable contributions, either under all circumstances, Re Mountain States Tel. & Tel. Co., 22 P.U.R. 4th 516 (Colo. PUC 1977); Re Iowa Power & Light Co., 6 P.U.R.4th 446 (Iowa PUC 1974); or under almost all

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Respondent Joseph Cahill is a practicing Roman Catholic who has lived in the Town of Fishkill, N.Y. for over twenty-five years. (JA 84) He is a

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circumstances, Boston Gas v. Dep't of Public Utilities, 539 N.E.2d 1001 (Mass. 1989) (disallowing contributions unless they provide "direct or essential benefit to ratepayers"; benefit to service area insufficient); New Jersey Bell Tel. Co. v. Dep't of Public Utilities, 97 A.2d 602 (1953) (disallowing contributions unless "reasonably necessary in the rendition of service to the consumer"; commission must examine relationship of each contribution to the "functional operation of the company").

Moreover, most of the remaining decisions cited by petitioners are by state public service commissions, not by courts. As the cases cited in the text above, most of which are by the highest court of a state, make clear, the vast majority of state courts to have considered the question have rejected efforts to charge ratepayers for the charitable contributions of monopoly utilities.

customer of petitioner New York Telephone Company ("N.Y. Telephone") and of Central Hudson Gas & Electric Corporation ("Central Hudson"), a former intervenor in this case that has abandoned its appeal. (A3, JA 149, JA 65)

Cahill commenced this proceeding against the PSC in the New York State Supreme Court challenging as violative of the First Amendment the PSC policy under which he, as a ratepayer, was forced to fund (1) organizations engaged in activities and causes contrary to his political and personal beliefs; (2) religious institutions that expound beliefs inconsistent with his own; and (3) organizations that promote the right to abortion, to which he is opposed on moral and religious grounds. (A3) The PSC and certain utilities that were

added as parties moved to dismiss the action on the ground that state action was not present, and after their motion was denied by the trial court (A54-60), the Appellate Division (A45-49), and the Court of Appeals (A28-36), this Court denied certiorari. 494 U.S. 829 (1987).

Subsequently, the Attorney General of the State of New York commenced a separate action challenging the PSC's charitable contribution recoupment policy under the First Amendment, and that action was consolidated with Cahill's. (A3) On May 10, 1988, based on the record consisting of the undisputed portions of the petitions of Cahill and the Attorney General and the affidavits submitted by the PSC and the utilities, the trial court annulled the PSC policy. (A23-27) On June 1, 1989, the

Appellate Division unanimously affirmed the trial court's decision. (A16-22)

Two of the utility respondents, N.Y. Telephone and Rochester Gas and Electric Corporation, then appealed to the New York State Court of Appeals. The PSC, however, did not appeal. (A3) Nor did the PSC seek a stay of the decision annulling its policy. Instead, the PSC responded to the court's decision by abandoning the challenged policy in a series of decisions that (1) required the utilities involved in this litigation to defer revenues associated with allowances for charitable contributions and offset those deferrals against future rate awards, and (2) reflected the new policy with respect to other utilities in the next rate case for each company. PSC Opinion in Case No.

29119 (September 25, 1989); PSC Opinion No. 89-34 in Case No. 88-G-229 (October 13, 1989); PSC Opinion No. 89-38 in Case No. 88-G-226 (October 26, 1989).

The decision by the PSC to abandon its policy was explicit:

> We have recently revisited our policy concerning charitable contributions. We ended the allowance of charitable contributions, by means of a deferral of revenues, for the companies involved in the Cahill litigation.

PSC Opinion No. 89-34 in Case No. 88-G229 (October 13, 1989) (emphasis added).

The PSC decided to abandon the policy over the dissenting opinion of one commissioner who believed that "[t]here should be no change in this Commission's policy until a final judicial determination of this is made." PSC Opinion in Case No. 29119 (September 25, 1989) (dissenting

opinion at 2). Thus, by the time the case reached the court below, the PSC had ceased to defend its own policy, and the only representative of the State of New York remaining in the case was the Attorney General, who was continuing to challenge the now-abandoned policy and who opposes the grant of certiorari by a separate Memorandum Opposing Certiorari filed today.

On May 10, 1990, the Court of Appeals affirmed the decision of the lower court. (A1-15) The present petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

When the PSC elected to "revisit" and terminate its policy, the Article III case or controversy between the parties ended. Under current PSC policy, petitioners cannot charge

ratepayers for their charitable contributions. It is thus entirely speculative whether a decision by this Court favorable to the petitioners would actually benefit them. Therefore, this Court does not have jurisdiction to grant the petition.

In any event, there is no basis for the Court to grant review of this case. Petitioners have not cited a single case whose holding conflicts with the holding of the court below. The New York Court of Appeals was correct in finding that the PSC's decision to force ratepayers to finance the charitable contributions of monopoly utilities constituted state action and violated the First Amendment. Moreover, precedents such as Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), require that strict

scrutiny be applied to any scheme which requires an individual to finance the speech of another, a test under which, the Court of Appeals correctly found, the PSC policy clearly failed.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CASE OR CONTROVERSY.*

The decision by the PSC to abandon the challenged policy, ended the Article III controversy between the parties. Cahill's challenge was specifically to the PSC policy,

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* Respondent Cahill did not make this argument in the court below because the New York Court of Appeals, unlike this Court, has jurisdiction to consider "significant or important questions not previously passed upon" even where the case has become moot and no case or

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adopted in 1970, under which the PSC includes as operating expenses to be considered in setting just and reasonable rates, charitable contributions of utilities. (A61-64)

Footnote cont'd. from preceding page

controversy currently exists. Hearst Corp. v. Clyne, 431 N.Y.S.2d 400 (1980). The fact that a state court issues a ruling on a matter of federal constitutional law, however, does not confer jurisdiction on this Court where no case or controversy exists:

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

Indeed, Cahill's action was initially filed only against the PSC and its Commissioners, with the utilities subsequently added as parties. (A55-56)

Since the PSC decided last September to abandon the challenged policy (over the dissent of one Commissioner) there is no controversy between the remaining parties. Even if this Court were to grant certiorari and were to decide that the New York Court of Appeals had erred, petitioners still could not charge their ratepayers for their charitable contributions. Given that (1) the PSC elected not to appeal the Appellate Division's decision but to "revisit" and abandon the policy over the dissent of a Commissioner, (2) the membership of the PSC changes on a regular basis, and (3) a decision by

the PSC to reinstate the charitable contribution recoupment policy would certainly face new challenges under the New York State Constitution and statutory law, any suggestion that a decision in favor of the petitioners would result in reinstatement of the policy by the PSC would be entirely speculative. Such speculation that a favorable ruling might benefit a litigant cannot create a case or controversy, where one does not presently exist.

Thus, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), several indigents and groups composed of indigents sued the Secretary of the Treasury and the Commissioner of the IRS asserting that the IRS had violated the IRS Code and the Administrative Procedure Act by

granting tax exempt status under 28 USC §501(c)(3) to hospitals that offered to indigents only emergency-room services. Plaintiffs' theory was that they had been injured by the IRS's action because if the IRS had complied with the law and denied tax-exempt status to such hospitals, such hospitals would have been discouraged from denying their services to the plaintiffs. In holding that no case or controversy existed between the parties, this Court found it

> speculative whether the desired exercise of the court's remedial powers would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.

426 U.S. at 43. Such "unadorned speculation will not suffice to invoke the federal judicial power." Id. at 44.

Similarly, in Allen v. Wright, 468 U.S. 737, reh. denied, 468 U.S. 1250 (1984), the parents of black public school children sued the Secretary of the Treasury and the Commissioner of the IRS, alleging that the IRS was unlawfully granting tax-exempt status to private schools that discriminated on the basis of race. Plaintiffs' theory was that the IRS's conduct would "facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts", thus injuring the ability of plaintiffs' children to

attend desegregated public schools. 468 U.S. at 746.

In holding that no case or controversy existed between the parties, the Court found the claimed injury to be as speculative as in the Simon case. 468 U.S. at 759. It was speculative whether (1) a change in the IRS policy would affect the policies of any private school, (2) the change in the policy of any school would affect the decision of any parent whether to send a child there, and (3) "in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." 468 U.S. at 758. Because the plaintiffs had not shown that they

stood "to profit in some personal interest" by a favorable decision, they had not met the "fundamental requirement" of Article Three of the Constitution. 468 U.S. at 766.

Petitioners here are just like the plaintiffs in the Allen and Simon cases. Although they disagree with the decision below, their quarrel is no longer with the state courts or even with Mr. Cahill. Rather, it is with the PSC, which elected to abandon its policy. Petitioners' suggestion that they will actually benefit by a favorable ruling from this Court is thus "unadorned speculation," which is dependent on predicting future actions by the PSC.

A case almost identical to the case at bar is Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

In Bender, a local school board had prohibited a religious student group from meeting in a public school on Establishment Clause grounds. Ten students sued the school board, and the district court ruled that the school board had violated the free speech rights of the students. Rather than seek a stay or appeal, the school board responded by voting 8-1 to revise its policy and allow the student group to meet. The dissenting school board member then appealed to the court of appeals, which reversed, holding that the Establishment Clause barred the group from meeting.

After granting the students' petition for certiorari, this Court reversed, holding that the court of appeals had not had jurisdiction to hear the dissenting school board

member's appeal, either in his official capacity or in his individual capacity as the parent of a student. 475 U.S. at 548-49. As Justice Marshall explained in his concurring opinion:

> That controversy [between the students and the school board] ended with the entry of the District Court judgment; the School Board voting 8-1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

475 U.S. at 549.

In the same way, the controversy between the parties in this lawsuit ended when the PSC voted to abandon its policy*.

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* It would be different were petitioners to argue that they had

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II. IN ANY EVENT, PETITIONERS HAVE NOT SET FORTH ANY BASIS FOR THIS COURT TO GRANT REVIEW.

Even if petitioners could show that a case or controversy exists and that this Court therefore has jurisdiction to grant their petition for a writ of certiorari, they have not demonstrated the "special and important reasons" that would justify the

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* a constitutional right to charge ratepayers for their charitable contributions, an argument which they do not make. In that case, they could institute a proceeding against the PSC, not a party here and would have independent standing to defend their own constitutional rights. Moreover, in that case, a favorable decision by this Court would result in the reinstatement of the recoupment policy, and thus the benefit to petitioners of a favorable ruling would not be speculative.

granting of the writ. Sup. Ct. R. 10.1. The decision of the New York Court of Appeals, striking down a policy of a New York State agency, put it in line with the vast majority of state supreme courts that have considered such forced charitable contribution schemes. Moreover, petitioners have cited no decision of any state or federal court in which the constitutional issues presented here were considered and decided in conflict with the decision below. The decision below is entirely consistent with this Court's precedents regarding state action and compelled speech.

A. THE PSC POLICY CONSTITUTED STATE ACTION.

The court below correctly identified the "critical issue" as

whether this case involves the "private conduct of a utility in which the state has merely acquiesced" or "governmental conduct of an agency of the state itself." (A31) In finding the latter, the court pointed out that Cahill was not challenging the decision of the utilities to make charitable contributions, but rather the decision of the PSC to force utility customers to pay for them. (A32) This coercion results from the fact that it is

> the State [that] establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.

(A32) In finding state action, the court below relied on the "broad grant of rate-setting authority vested in the PSC by the Legislature" (A35),

including its "exclusive authority to determine just and reasonable rates." (A33) "[N]o utility may charge more or less than the rates established by the PSC" (A33), and "the customer must pay or be deprived of his right to utility service." (A32)

As the court below found, this case is thus completely distinguishable from Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and Blum v. Yaretsky, 457 U.S. 991 (1982). (A34) In Jackson, the plaintiff was a utility customer who filed a lawsuit against a utility, not the utility commission, challenging the utility's decision to terminate service for non-payment of a bill. The state action that was alleged was the fact that the utility's tariff that had been approved by the

Public Utility Commission had included a provision stating the utility's right to terminate service for non-payment. This Court found that such a provision had routinely appeared in the utility's previously filed tariffs for many years, had never actually been considered by the commission, and had automatically become effective 60 days after filing when not disapproved by the commission. 419 U.S. at 354-55. Furthermore, this Court found that it was not even clear under state law whether the utility was even required to file this provision as part of its tariff or whether the commission would have had the power to disapprove it. Id. at 355. Under these circumstances, the Court found that the utility's decision to terminate service did not

constitute state action.

In Blum, the plaintiffs challenged the decisions of private nursing homes to transfer patients. There were no state regulations authorizing the transfers, and thus no state regulatiions to challenge. Instead, the plaintiffs sought an injunction requiring the state "to adopt regulations that will prohibit the private conduct of which they complain." Blum, 457 U.S. at 1003. The Court found that the private decisions of the nursing home operators were not converted into state action by the state's non-action.

Those cases stand in marked contrast to the case at bar, where what is being challenged is the decision by the PSC to include in the rates that it

has the exclusive authority to set the cost of the charitable contributions of public utility monopolies. This was a publicly announced policy of the PSC which, in 1970, represented a reversal of its longstanding policy to exclude such contributions as operating costs. Thus, the court below rejected petitioners' suggestion that the role of the PSC consituted the "passive acquiescence" that was found not to constitute state action in the Jackson and Blum cases. (A34-35)*

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* Petitioners' suggestion that since "corporations routinely make charitable contributions," the PSC did not allow petitioners to do anything that they would not otherwise have done (Pet. at 13),

Footnote cont'd. on following page

Since it is the PSC's policy that compels Cahill to subsidize the charitable contributions of monopoly utilities, "the cause of power and authority by which respondent's rights are lost or sacrificed, is the governmental action on which the Constitution operates." Railway Employees' Dep't v. Hanson, 351 U.S.

Footnote cont'd. from preceding page

* is misleading. It ignores the fact that the customers of utility monopolists have no choice but to pay for such contributions or be deprived of service. (A32) Private corporations cannot make charitable contributions without taking into account the effect of such contributions both on their profitability and on the attitudes of their customers, who have the choice not to patronize a corporation whose charitable contributions they find offensive. Through their monopoly status and the setting of their rates by the PSC, public utilities are protected from those market forces.

225, 232 (1956).

Accordingly, the court below properly concluded that the PSC's policy represented state action.*

B. THE PSC POLICY VIOLATED THE FIRST AMENDMENT.

The court below correctly found that the compelling state interest test was applicable to the PSC's charitable contribution recoupment policy (A7-8), and that the

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* Petitioners argue that for case or controversey purposes they should be viewed as the legal alter egos of the PSC, but for the purposes of the merits they should be viewed as purely private actors free from the constraints of the First Amendment. Obviously, petitioners cannot have it both ways. If they are to be treated as stand-ins for the PSC, then state action is clearly present. If they are to be treated as purely private entities, then the failure of the PSC to have appealed destroys any vestige of an Artice III case or controversy.

purported state interests tendered by petitioners could not satify that test. (A8-9) That decision was entirely consistent with the precedents of this Court such as Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. Brotherhood of Ry. Airline and Steamship Clerks, 466 U.S. 435 (1984), and Keller v. State Bar, 110 S.Ct 2228 (1990), which require exacting scrutiny of any scheme in which individuals are required to finance the speech of others. Cf. Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) ("the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to [its] political message") (Brennan, J., concurring). In striking down the PSC policy, the court below invoked Thomas

Jefferson's "ringing alarm," invoked by this Court in Abood, that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." (A5)

In an attempt to distinguish this case from the precedents cited above, petitioners argue the novel theory that one's speech and associational rights under the First Amendment are abridged by a scheme in which one is forced to fund the speech of another only if one is publicly identified with that speech. (Pet. at 18) There is no case, however, that so limits one's freedom from compelled speech and association, and petitioners cite none. To the contrary, the cases cited above make clear that it is compulsion to fund speech with which

one disagrees that violates the First Amendment regardless of whether one will be identified with it.

Thus, in Abood, the plaintiffs were employees who were not members of a union, but were required under an "agency shop" agreement to pay to the union a service fee equal to union dues. As non-members, the plaintiffs would not be associated with the speech of the union. And yet, by upholding the "agency shop" agreement in Abood, this Court found that it had "countenanced a significant impingement of First Amendment rights," not because the dissenting employee would be associated with the views of the union, but because the employee "is forced to support financially an organization with whose principles and demands he

may disagree." Ellis, 466 U.S. at 455-56. In Abood, the Court stated clearly that First Amendment principles "prohibit [the union] from requiring any of the appellants to contribute to the support of an ideological cause he may oppose." 431 U.S. at 235 (emphasis added). And, to the extent the Court viewed the right in question as one of association, the Court clearly considered associational rights to be impaired by the coerced funding itself without regard to the question of public identification:

> To be required to finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for advancement of ideas, or to refrain from doing so, as he sees fit.

Abood, 431 U.S. at 222 (emphasis added).

The Court in Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), reiterated that it was the "compulsory subsidization of ideological activity" that was condemned in Abood, because of "the tyrannical character of forcing an individual to contribute even 'three pence' for the propogation of opinions which he disbelieves.'" 475 U.S. at 302, 305 (emphasis added). This principle was reiterated by the Court just last term in Keller v. State Bar, 110 L.Ed.2d at 11.* Thus,

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* The conclusion of the court below is identical to that of the members of this Court who have already addressed the precise question presented by this petition. Thus, in Consolidated Edison Co. v. PSC, 447 U.S. 530 (1985), this Court considered a PSC ban on the

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petitioners' attempt to limit the

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* inclusion by utilities of informational inserts on controversial public policy issues in their billing envelopes. This Court struck down the ban on First Amendment grounds, reasoning that the PSC had not demonstrated that it could not allocate the costs of inserts to the utility's shareholders (rather than to the ratepayers who could properly be charged for the bills themselves). The Court expressly declined to decide whether the rule of Abood would prohibit the PSC from passing on to ratepayers the cost of the inserts.

However, in the dissenting opinion, Justice Blackmun, joined in relevant part by (then) Justice Rehnquist, reached out to decide the question left open by the majority, holding the rule of Abood fully applicable to the present issue:

> If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights....

447 U.S. at 552 (citations omitted).

holding of Abood and its progeny to cases of public identification is wholly without merit.

Similarly without merit is petitioners' protest of the supposedly dire implications of the decision of the court below (Pet. at 25-28), which simply placed the State of New York in line with almost every other state whose courts have considered such forced contribution schemes. Contrary to petitioners' claim (at 25), the holding of the court below casts no doubt whatever on the right of the government to spend tax revenues as it sees fit. As explained by Justice Powell in Abood:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state

> interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union....*

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* Abood, 431 U.S. at 259 n.13 (Powell, J., concurring).

Or of a telephone company. The court below recognized this fundamental distinction. (A9-10)*

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* The Court has granted certiorari in Lehnert v. Ferris Faculty Assoc., No. 89-1217. Significantly, both parties in Lehnert acknowledge that, even where there is a sufficient state interest to warrant compulsory subsidization of a union by non-member employees, the permissible compulsory subsidization is limited to the core functions of the union. Neither side even suggests that employees could be forced to fund functions as tangential to the union's core function as charitable contributions.

Contrary to petitioners' contention (at 15), the PSC has never made a finding that there is any connection whatever between charitable contributions and the "efficient operation" of utilities, and based its 1970 policy instead on a desire to benefit charities. See supra, at 2. Only the petitioners have alleged such a connection, and the court below found that allegation to be "at best speculative." (A9)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-255

OCT 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY
AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

vs.

JOSEPH CAHILL
AND
ROBERT ABRAMS, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

MEMORANDUM OPPOSING CERTIORARI

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MEMORANDUM OPPOSING CERTIORARI

STATEMENT OF THE CASE

The New York Public Service Commission ("Commission") is the regulatory agency empowered by the New York Public Service Law to determine intrastate rates charged customers located in New York by investor-owned utilities. New York Public Service Law, §§65(1), 91(1).

On June 11, 1985, Robert Abrams, Attorney General of the State of New York, filed a petition with the Commission seeking discontinuance of its policy, initiated in 1970, authorizing

recovery from ratepayers of amounts paid by utilities for charitable contributions. In response to the Attorney General's petition, the Commission instituted its Case 29119 and invited interested parties to comment.

During 1986, the Attorney General intervened in cases involving the rates of three utilities, one of which was petitioner Rochester Gas and Electric Corporation, again asking the Commission to reverse its policy authorizing the recovery of charitable donations.[1] The Commission rejected the Attorney General's request in each of these cases[2] and, during 1987 and 1988, the Attorney General commenced proceedings pursuant to article 78 of the New York Civil Practice Law and Rules against the Commission and the three utilities seeking judicial review of these Commission orders.[3] The Attorney General brought these petitions as *parens patriae* on behalf of the citizens of the State of New York, who were affected by the Commission's policy.

In 1984, Joseph Cahill, a residential customer of petitioner New York Telephone Company, had brought an article 78 proceeding against the Commission and that company seeking similar relief on identical grounds.[4] In all of the proceedings arising from the Attorney General's and Cahill's petitions, the Commission was represented by its own counsel.

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[1] The Commission rate cases were 29327 and 29328 (Niagara Mohawk Power Corporation) (Joint Appendix ["J.A."] before the New York Court of Appeals at 744), 29426, 29427 and 29428 (Rochester Gas & Electric Corporation) (J.A. at 755), and 29433 (Central Hudson Gas & Electric Corporation) (J.A. at 756).

[2] The Commission rate case determinations were rendered in Opinion Nos. 87-3 and 87-3(A) (J.A. at 744), Opinion Nos. 87-13 (J.A. at 647-651) and 87-13(A), and Opinion No. 87-15 (J.A. at 634-645).

[3] *Abrams v. Public Service Commission and Niagara Mohawk Power Corporation*, Index No. 5865/87 (Sup.Ct.Alb.Co.), and *Abrams v. Public Service Commission, Rochester Gas & Electric Corporation and Central Hudson Gas & Electric Corporation*, Index No. 269/88 (Sup.Ct.Alb.Co.).

[4] *Cahill v. Public Service Commission*, Index No. 12464/84 (Sup.Ct.Alb.Co.). Cahill subsequently added the New York Telephone Company as a respondent and Central Hudson Gas & Electric Corporation was granted leave to intervene as a respondent.

On December 19, 1986, the New York Court of Appeals held that the Commission's orders constituted state action and that the petitions asserted a cognizable claim under the United States Constitution. This Court denied certiorari. *Cahill v. Public Service Commission*, 69 N.Y.2d 265 (1986), *aff'g* 121 A.D. 2d 842 (3d Dept. 1985), *cert. denied*, 484 U.S. 829 (1987).

On remand, the Supreme Court of the State of New York, Albany County, consolidated the Attorney General's and Cahill's petitions,[5] and granted the petitions insofar as they sought a declaration annulling the Commission's orders.[6]

The Commission and the four utility respondents appealed the Supreme Court order to the Appellate Division of the Supreme Court. The Appellate Division affirmed. *Cahill v. Public Service Commission*, 147 A.D.2d 49 (3d Dept. 1989).

The Commission and two of the four utilities which had been parties ceased to participate in the *Cahill* litigation upon entry of the Appellate Division order. Only the present petitioners sought review of the Appellate Division order in the New York Court of Appeals. On May 10, 1990, the Court of Appeals issued its opinion and order affirming the order of the Appellate Division. *Cahill v. Public Service Commission*, 76 N.Y.2d 102 (1990).

While *Cahill* was pending before the Court of Appeals, the Commission implemented the Appellate Division order and ultimately discontinued as to all utilities its policy authorizing the recovery of charitable donations. First, in response to a request by the Attorney General, on September 25, 1989 the Commission issued an order requiring petitioners and the two other utilities which had been parties to *Cahill* to establish special accounts into which the utilities were directed to pay amounts equal to the charitable donations which were recovered under the now superseded rate case orders. The utilities were

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[5] J.A. at 488-490.

[6] J.A. at 412-423.

ordered to use the amounts deposited into these segregated accounts as offsets against future rate increases. These deferral accounts were made effective retroactive to June 29, 1989, the date of entry of the Appellate Division order. Public Service Commission Case 29119, "Petition of the Attorney General Requesting Adoption of a Rule Prohibiting Utilities from Recovering from Ratepayers the Cost of the Utilities' Charitable Donations", Order Requiring Deferral of Revenues, Issued September 25, 1989. (Respondent's Appendix ["R.A."] at A-1.)

In a subsequent order involving a utility which had not been a party to the *Cahill* litigation, the Commission denied recovery of charitable contributions, referring to its September 25, 1989 order and noting that it had "recently revisited" its policy concerning charitable donations and had "ended the allowance of charitable contributions. . . ." Opinion No. 89-34, issued October 13, 1989 in Public Service Commission Case 88-G-229, "Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Gas Service", at 31. (R.A. at A-7.)

On July 6, 1990, the Commission issued its first order determining the rates of petitioner Rochester Gas and Electric Corporation following issuance of the September 25, 1989 order establishing the deferral accounts. In the rate case order, the Commission explicitly prohibited petitioner from recovering charitable donations from ratepayers. Opinion No. 90-17, issued July 6, 1990 in Public Service Commission Cases 89-E-166, 89-E-167 and 89-G-168, "Proceedings on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas & Electric Corporation for Electric, Street Lighting and Gas Service", at Appendix A, Schedule B, page 1; Appendix B, Schedule B, page 1. (R.A. at A-11, A-16.) The Commission also ordered petitioner to pass back to ratepayers $467,000 which it had segregated in accordance with the Commission's September 25, 1989 order. *Id.*, Appendix A, Schedule D at 1; Appendix B, Schedule C at 2. (R.A. at A-13, A-19.) The Commission has not had occasion since September 25, 1989 to issue an order determining the rates charged by petitioner New York Telephone Company.

ARGUMENT

Petitioners seek from this Court an order reversing the decision of the New York Court of Appeals. If this Court were to issue such an order, however, petitioners would still not be able to recover their charitable donations from ratepayers. Since the Commission has now issued orders removing charitable donations from the category of recoverable expenses, petitioners could not resume recovery for this item unless the Commission were to issue new orders authorizing such recovery.

Even if a reversal of the Court of Appeals decision placed the Commission in a position where it could once more authorize recovery for charitable donations, it would be under no legal obligation to do so. The result of its recent "revisiting" of the question led the Commission to end the allowance of the recovery of charitable donations. What the Commission would do upon a future review would be within the Commission's discretion, subject to further judicial review.

Given the present posture of this case, there is no "case or controversy" as required by Article III. As the Court said in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), ". . . the 'case or controversy' limitation of Art. III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." 426 U.S. at 41-42. Similarly, there must be a substantial likelihood that prospective relief by a federal court will redress the alleged injury. *Id.* at 45-46. *Accord Bender v. Williamsport Area School District*, 475 U.S. 534 (1986); *Warth v. Seldin*, 422 U.S. 490, 505 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

In this case, even if this Court were to grant the petition for certiorari and reverse the decision of the Court of Appeals, the petitioners could not resume the recovery of charitable donations from ratepayers. The only party who can authorize such recovery, the Commission, was not before the Court of Appeals and is not before this Court.

This Court in *Simon* explained that there was no case or controversy when the party who could provide the relief sought was not before the court and it was speculative whether the plaintiff could be benefitted by a favorable decision. In *Simon*, the plaintiffs sought review of new Internal Revenue Service regulations which, plaintiffs claimed, had diminished the amount of care hospitals would provide the indigent without charge. The Court dismissed the petition because "it does not follow from the allegation . . . that the denial of access to hospital services in fact results from petitioner's new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire." 426 U.S. at 42.

Similarly here, it is wholly speculative whether the Commission, which is not a party, would authorize the recovery of charitable donations if it were free to do so. In light of the fact that this Court cannot afford petitioners the relief they seek, i.e., reinstitution of the Commission's policy authorizing the recovery of charitable donations, there is no case or controversy before the Court and certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, New York
October 5, 1990

APPENDIX

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 7, 1989

COMMISSIONERS PRESENT:

Peter Bradford, Chairman
Harold A. Jerry, Jr.
Eli M. Noam, not participating
James T. McFarland, dissenting
Edward M. Kresky
Henry G. Williams

CASE 29119 – Petition of the Attorney General Requesting Adoption of a Rule Prohibiting Utilities from Recovering from Ratepayers the Cost of the Utilities' Charitable Donations.

ORDER REQUIRING DEFERRAL OF REVENUES

(Issued and Effective September 25, 1989)

BY THE COMMISSION:

Since 1970, the Commission has allowed utilities to recover in rates, as a reasonable business expense, a portion of their charitable contributions. On October 16, 1984, Mr. Joseph Cahill instituted a court proceeding challenging (1) the Commission's charitable contributions policy, and (2) the 1984 New York Telephone Company rate case decision insofar as it allowed that company to recover for charitable contributions. Mr. Cahill also asked the court to grant such other relief as it deemed necessary and proper.

Later, the Attorney General of the State of New York instituted Article 78 proceedings challenging rate case decisions for Niagara Mohawk Power Corporation, Central Hudson Gas & Electric

Corporation, and Rochester Gas and Electric Corporation. It argued that those decisions violated customers' First and Fourteenth Amendment rights by allowing rate recovery of charitable donations. The Attorney General's petition asked the court to prohibit rate recovery of charitable donations by these companies *and* to require refunds of all sums recovered on account of charitable donations pursuant to the decisions.

On June 1, 1989, the Appellate Division, Third Department, upheld a lower court decision granting both petitions but rejecting the Attorney General's request for monetary refunds. The Court, therefore, annulled the charitable contributions policy and the rate orders at issue. Although the utilities have expressed an intention to appeal, they have not obtained a stay of the Appellate Division's order.

By letter dated June 15, 1989, the Attorney General has asked that we implement the Appellate Division's decision by requiring *all* utilities – not only the four involved in the litigation – to reduce rates. In the alternative, the Attorney General asks that utilities be directed to defer revenues associated with the deferrals to be used as offsets against future rate increases or, as a last resort, to make rates temporary pending the utilities' appeals. The Consumer Protection Board has submitted a letter in support of the Attorney General.

Various utilities oppose the request. They argue, among other things, that there should be no rate change, or even a deferral, until all utilities have been afforded an opportunity to be heard on the adequacy of current rates.

In view of the Court's decision, which has not been stayed, some action is required with respect to the four companies involved in the litigation, whose rates the Court has held to be excessive. Reducing rates now would be unwarranted, for it would impose substantial and costly administrative burdens while having a barely noticeable effect on customers' bills. The better alternative is to require the four companies to defer the revenues associated with their allowances for charitable contributions and offset those deferrals against future rate awards

The deferrals should be effective as of June 29, 1989, the date on which the order implementing the Appellate Division's decision was entered.

The deferrals here required are necessary to insure that the mandate of the Court is complied with and that the rates of the companies affected are just and reasonable, in accordance with the Court's determination. Accordingly, this Order is adopted as an emergency action pursuant to Sec. 202(6) of the State Administrative Procedure Act (SAPA), inasmuch as its immediate adoption is necessary for the preservation of the general welfare and compliance with the requirements of Sec. 202(1) of SAPA would be contrary to the public interest.

The Commission orders:

1. Commencing June 29, 1989, New York Telephone Company, Niagara Mohawk Power Corporation, Central Hudson Gas and Electric Corporation, and Rochester Gas & Electric Corporation shall defer monthly an amount equivalent to one-twelfth (1/12) of the annual revenue allowance for charitable contributions authorized in each company's most recent rate proceeding(s) for electric, gas or telephone service as applicable. The federal income tax effect of these amounts shall also be deferred. Such deferrals shall continue until the Commission renders a decision in the respective company's next major rate proceeding(s) for the affected services (electric and gas or telephone). The amounts so deferred shall be disposed of in a manner consistent with their treatment for rates.

2. The amounts deferred pursuant to Ordering Clause 1 above shall accrue interest at the unadjusted customer deposit rate. Such amounts of interest, and their income tax effect, shall be deferred for disposition by the Commission.

3. The following accounts shall be used for the deferrals described in Ordering Clauses 1 and 2 above:

Electric and Gas:

Account 253, Other Deferred Credits, and

Account 190, Accumulated Deferred Income Taxes

Telephone:

Account 4360, Other Deferred Credits, and

Account 1360, Current Deferred Income Taxes - Dr, or

Account 1510, Noncurrent Deferred Income Taxes - Dr.

4. Records for the above deferrals shall be maintained in such a manner so as to readily identify to which department each is applicable.

5. This proceeding is continued.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 29119 - Petition of the Attorney General Requesting Adoption of a Rule Prohibiting Utilities from Recovering from Ratepayers the Cost of the Utilities' Charitable Donations.

JAMES T. McFARLAND, Commissioner, dissenting:

The long standing Commission policy of permitting utilities to expense charitable contributions was and is a proper and reasonable regulatory judgment.

Investor-owned utilities are not public entities such as a municipal subdivision or public benefit corporations. They are only publicly regulated in their mission and finances and are thus essentially private corporations. As such they are obligated to meet their traditional American corporate civic responsibilities by participating in charitable activities.

I believe the practice of utilities giving charitable contributions, if not abused and in reasonable amounts, is a worthwhile and laudable utility practice which should be continued.

Further, to conclude that a ratepayer can follow the fraction of a cent of his or her monthly payment to a utility to its ultimate destination with a particular charitable activity strains credulity. It makes as much sense as suggesting that one can follow the wool from a single sheep in the flock to its ultimate destination as a thread in a man's suit. To justify the preclusion of the charitable giving practiced by utilities as a violation of freedom of speech or freedom of religion is simply an over-extension of those treasured doctrines.

I would hope that ultimately the decision of the intermediate appeallate court will be reversed on appeal. There should be no change in this Commission's policy until a final judicial determination of this is made.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 89-34

CASE 88-G-229 - Proceeding on motion of the Commission as to the rates, charges, rules and regulations of Consolidated Edison Company of New York, Inc. for gas service.

OPINION AND ORDER APPROVING REVENUE REQUIREMENT SETTLEMENT AND PRESCRIBING RATE DESIGN

Issued and Effective: October 13, 1989

Con Edison is to return excess earnings to its ratepayers over a 12-month period.

4. *Charitable Contributions*

The Stipulation reflects inclusion of $303,000 of charitable contributions, and provides that the allowance shall continue until the Commission's policy of allowing charitable contributions as a recoverable expense is finally found to be unconstitutional and all rights of appeal are exhausted. The recommended decision rejected, on the basis of existing Commission policy, the Attorney General's request that company revenues attributable to charitable contributions be collected subject to refund.

The Attorney General excepts, and argues on the basis of the Appellate Division's decision in *Cahill*[1] that the Commission is bound legally and morally to implement the decision by prohibiting continued recovery of charitable contributions in rates.

Con Edison points out in Reply Exceptions that the treatment of charitable contributions follows the requirements of the Stipulation, which the Attorney General has neither supported nor opposed. Since all court appeals have not been exhausted, the company would have the terms of the Stipulation control.

Staff replies that it sees no reason to depart from the Stipulation. However, as a possible compromise of the opposing positions, staff suggests that allowed revenues be reduced by $303,000, but that Con Edison be permitted to record the expense in a deferred account. If the final outcome of *Cahill* is contrary to any allowance, the expense deferral can be reversed; if the final outcome of *Cahill* supports an allowance, we can prescribe a method for recovery of the deferred amount.

We have recently revisited our policy concerning charitable contributions. We ended the allowance of charitable contributions, by means of a deferral of revenues, for the companies

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[1] *Cahill v. Public Service Commission*, 147 App. Div. 2d 49 (3d Dept. 1989).

involved in the *Cahill* litigation.[1] No action was taken in that order on the Attorney General's request that the rates of all utilities be reduced to reflect disallowance of charitable contributions or that the utilities be directed to defer the related revenues. For utilities not involved in *Cahill*, we decided to reflect the court's prohibition on rate recovery of charitable contributions in the next rate case of each company. Accordingly, in Brooklyn Union's pending gas rate case,[2] a settlement that left rates unchanged was approved, but we reflected a disallowance of charitable contributions by reducing the amortization of deferred tax credits. Consistent with *Brooklyn Union*, in this proceeding, which involves a rate increase as part of the settlement Stipulation, the appropriate vehicle for reflecting disallowance of charitable contributions is the increase itself.

The revenue increase calculated according to the terms of the Stipulation should be reduced by $303,000 to reflect elimination of any recovery for charitable contributions expense.

Clarification as to Second- and Third-Stage Increases

The language of the Stipulation with respect to the permitted second and third stage increases appears susceptible to misinterpretation and future argument, despite present agreement by staff and the company as to what is intended. In order to avoid future controversy and to make clear the basis upon which we are evaluating the Stipulation,

---

[1] Case 29119, *Petition of the Attorney General Requesting Adoption of a Rule Prohibiting Utilities from Recovering from Ratepayers the Cost of the Utilities' Charitable Donations, Order Requiring Deferral of Revenues*, issued September 25, 1989.

[2] Case 88-G-226, *The Brooklyn Union Gas Company*.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 89-E-166 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas & Electric Corporation for Electric Service.

CASE 89-E-167 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas & Electric Corporation for Electric Street Lighting Service.

CASE 89-G-168 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas & Electric Corporation for Gas Service.

OPINION AND ORDER DETERMINING REVENUE REQUIREMENT AND RATE DESIGN

Issued and Effective: July 6, 1990

APPENDIX A
SCHEDULE B
(Page 1 of 2)

CASE 89-G-168

ROCHESTER GAS AND ELECTRIC CORPORATION
Gas Department Operating Expenses 12 Months Ended June 30, 1991 ($000's)

	As Adjusted by ALJ	Post-Record Updates & Commission Adjustments	ALJ as Adjusted	Authorized Increase	Per Commission
Purchased Gas	152,014	0	152,014	$0	152,014
Payroll	25,878	0	25,878	0	25,878
Pensions	2,226	0	2,226	0	2,226
Medical Insurance	1,300	0	1,300	0	1,300
Life Insurance	231	0	231	0	231
401(k) Savings Plan	480	0	480	0	480
Long Term Disability	47	0	47	0	47
Workers Compensation	270	0	270	0	270
Amortizations	(1,572)	0	(1,572)	0	(1,572)
Transportation	1,087	0	1,087	0	1,087
Consultants	1,248	0	1,248	0	1,248
Outside Services – Legal	803	0	803	0	803
Security Services	101	0	101	0	101
Contractors	1,558	0	1,558	0	1,558
Materials and Supplies – Stock	2,547	0	2,547	0	2,547

					152,014
Insurance	865	0	865	0	865
Research and Development	778	0	778	0	778
Telephone	503	0	503	0	503
Postage	495	0	495	0	495
Uncollectibles	1,855	0	1,855 (7a)	31	1,886
-OTHER-					
Injuries and Damages	130	0	130	0	130
Advertising	136	0	136 (7b)	3	139
Bank Fees	206	0	206	0	206
Donations	0	0	0	0	0
PSC Assessment	739	0	739	0	739
Energy Used By The Company	235	0	235	0	235
Outside Services – Other	4,182	0	4,182	0	4,182
Total Gas Expenses	$198,342	$0	$198,342	$34	$198,376

APPENDIX A
SCHEDULE D (Pages 1 of 2)
ROCHESTER GAS AND ELECTRIC CORPORATION
Gas Department
Rate Base
12 Months Ended June 30, 1991
($000's)

	As Adjusted by ALJ	Post-Record Updates & Commission Adjustments	ALJ as Adjusted	Authorized Increase
Net Plant	$226,619	$0	$226,619	$0
Working Capital				
Materials and Supplies	2,254	0	2,254	0
Prepayments	2,608	0	2,608	0
Operation and Maintenance	6,002	0	6,002 (c)	4
Total Working Capital	10,864	0	10,864	4

Accumulated Deferred FIT	(12,372) (a)	928	(11,444)	0
Accumulated Deferred ITC	(6,436)	0	(6,436)	0
EBCAP	(4,977)	0	(4,977)	0
Amortization				
Research and Development	(131)	0	(131)	0
Management Audit Fee	74	0	74	0
Insurance Reserve	(30)	0	(30)	0
HIECA	864	0	864	0
Unbilled Revenue Adj.	14,705 (b)	(1,805)	12,900	0
Pension Passback	(87)	0	(87)	0
Contributions Passback	(27)	0	(27)	0
Excess Earnings Passback	(1,156)	0	(1,156)	0
Total Amortization	14,212	(1,805)	12,407	0
Deferred Gas Costs	0	0	0	$0
Total Average Rate Base	$227,910	($877)	$227,033	$4

APPENDIX B
SCHEDULE B
(Page 1 of 3)

C. 89-E-166,167

ROCHESTER GAS AND ELECTRIC CORPORATION
Electric Department Operating Expenses 12 Months Ended June 30, 1991 ($000's)

	As Adjusted by ALJ	Post-Record Updates & Commission Adjustments	ALJ as Adjusted	Authorized Increase	Per Commission
Fuel – Nuclear	$26,147 (a)	($3,638)	$22,509	$0	$22,50
Fuel – Fossil	46,588 (b)	4,607	51,195	0	51,195
Purchased Power	30,116 (c)	8,458	38,574	0	38,574
Purchased Gas	697	0	697	0	697
Transmission – Wheeling	8,286	0	8,286	0	8,286
Oswego No. 6	3,122	0	3,122	0	3,122
NYS Power Pool Assessment	1,541	0	1,541	0	1,541
Amortization Items	5,503 (i)	580	6,083	0	6,083
Payroll	78,043 (d)	(361)	77,682	0	77,682
Pensions	6,291	0	6,291	0	6,291
Medical Insurance	3,672	0	3,672	0	3,672

Life Insurance	651	0	651	0	651
401(k) Savings Plan	1,357	0	1,357	0	1,357
Long Term Disability	133	0	133	0	133
Worker's Compensation	737	0	737	0	737
Payroll Complement Adj. — Benefits	397	0	397	0	397
Transportation	1,596	0	1,596	0	1,596
Contract. Services — Fly Ash Removal	833	0	833	0	833
Contract. Services — Tree Trimming	3,141	0	3,141	0	3,141
Contract. Services — Misc.	7,053 (e)	135	7,188	0	7,188
Legal Services	1,131	0	1,131	0	1,131
Security Services	2,551	0	2,551	0	2,551
Consultants	13,721	0	13,721	0	13,721
Materials and Supplies – Stock	10,880	0	10,880	0	10,880
Insurance	6,401 (f)	450	6,851	0	6,851
Research and Development	4,147	0	4,147	0	4,147
Demand Side Management	3,739 (g)	(2,899)	840	0	840
Telephone	2,028	0	2,028	0	2,028
Postage	720	0	720	0	720

Nine Mile Point # 2	18,199 (h)	(72)	18,127	0	18,127
Uncollectibles	1,729 (j1)	10	1,739 (j2)	116	1,855
- OTHER -					
Advertising	349 (k1)	2	351 (k2)	25	376
PSC Assessment	1,647	0	1,647	0	1,647
Water for Power	300	0	300	0	300
Energy Used By The Company	(235)	0	(235)	0	(235)
Donations	0	0	0	0	0
Bank Fees	934	0	934	0	934
Injuries and Damages	321	0	321	0	321
Outside Services –					
Other & Misc.	14,188	0	14,188	0	14,188
Total Electric Expenses	$308,654	$7,272	$315,926	$141	$316,067

APPENDIX B
SCHEDULE C
C. 89-E-166,167 (Page 1 of 3)
ROCHESTER GAS AND ELECTRIC CORPORATION
Electric Department Federal Income Tax 12 Months Ended June 30, 1991 ($000's)

	As Adjusted by ALJ	Post-Record Updates & Commission Adjustments	ALJ as Adjusted	Authorized Increase	Per Commission
Operating Income Before Federal Income Taxes	$112,954	$2,361	$115,315	$34,178	$149,493
Adjustments to Operating Income:					
Interest on Long Term Debt	(55,563) (a)	35	(55,528)	0	(55,528)
Interest on Short Term Debt	(4,719) (b)	(118)	(4,837)	0	(4,837)
Mortgage Recording Tax	411	0	411	0	411
Add'l. Ded. Property Taxes	(479)	0	(479)	0	(479)
Add'l. Deductible Depreciation	(42,481) (c)	9,969	(32,512)	0	(32,512)
Cost of Removal	(3,080)	0	(3,080)	0	(3,080)

Preferred Stock Dividends	(124)	0	(124)	0	(124)
Uncollectible Reserve	263	0	263	0	263
Nuclear Fuel Storage	0	0	0	0	0
Nuclear Fuel Depreciation	4,270(d)	(3,363)	907	0	907
Nuclear Decommissioning	5,104	0	5,104	0	5,104
Taxable Status Date	1,131	0	1,131	0	1,131
Interest Capitalized	4,552	0	4,552	0	4,552
Energy Audits	186	0	186	0	186
Insurance Reserve	0	0	0	0	0
Management Audit	78	0	78	0	78
Materials Management	0	0	0	0	0
Amortization of Other Plant	78	0	78	0	78
Reserach and Development	21	0	21	0	21
Demand Side Management	495(e)	(2,319)	(1,824)	0	(1,824)
Sterling Abandonment	1,664	0	1,664	0	1,664
Construction Contributions	1,472	0	1,472	0	1,472
Pension Passback	55	0	55	0	55
Nine Mile 2 Deferred Items	0	0	0	0	0

Unbilled Revenues	0	0	0	0	0
Mirror CWIP Amort	398	0	398	0	398
Ginna Reblade	660	0	660	0	660
Contributions Passback	(440)	0	(440)	0	(440)
Operating Income Adjustments	(86,048)	4,204	(81,844)	0	(81,844)
Taxable Income	26,906	6,565	33,471	34,178	67,649
Federal Income Tax @ 34%	$9,148	$2,232	$11,380	$11,620	$23,001

(5)

No. 90-255

Supreme Court, U.S.
FILED
OCT 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY
AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

v.

JOSEPH CAHILL
AND
ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITIONERS' REPLY TO THE BRIEFS IN OPPOSITION

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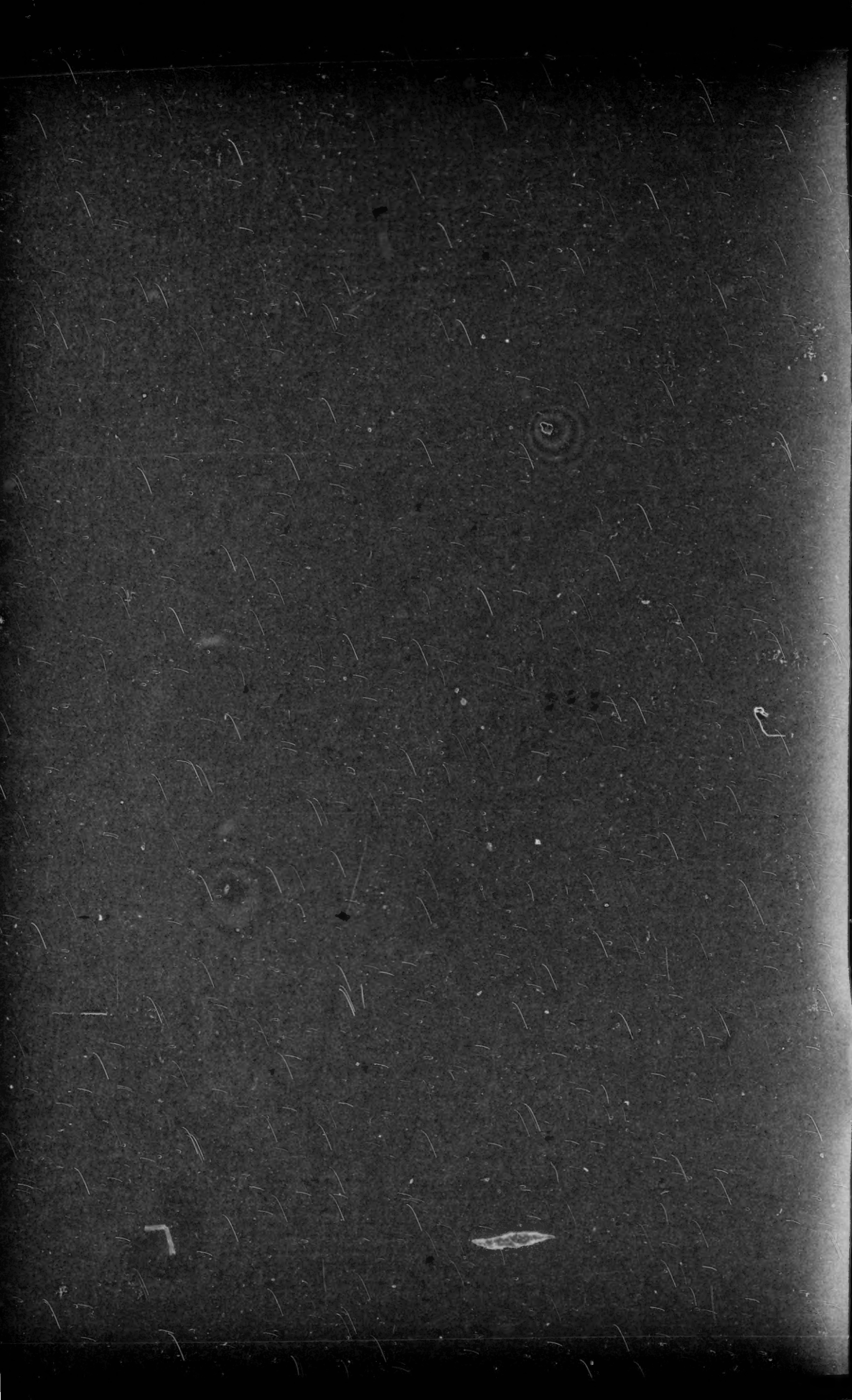
October 10, 1990

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS



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REPLY TO BRIEFS IN OPPOSITION

I. Respondents Are Grossly Mistaken in Suggesting That This Case is Non-Justiciable.

As their principal reason for opposing certiorari, respondents Cahill and Abrams contend at some length that there is no case or controversy for this Court to review because, they claim, the New York PSC has now reversed course and made a decision on the merits to exclude utility charitable contributions from the ratebase. (Abrams Br. 5-7); (Cahill Br. 12-23). *The PSC has done no such thing*. It has merely acceded *pendente lite* to the judicial decision of the New York courts because no party sought to have the mandate stayed pending appeal. The PSC had no choice but to put its 20-year-old contributions policy on hold while this case is resolved; if the state court decisions annulling that policy are reversed, the PSC policy, allowing petitioners to include certain charitable contributions, will once again prevail.

That this is so should have been clear to respondents from a formal stipulation adopted by the PSC in the very same ratesetting proceeding on which they rely. On April 15, 1990 — some months after the October 13, 1989 order that Cahill and Abrams invoke (Abrams Appendix A-6 to A-8) — the PSC removed any lingering doubt that it was merely staying its policy pending appeal: "Whereas . . . the outcome of the *Cahill* case is likely to have a substantial impact on the issues presented . . . in this proceeding, . . . all proceedings in this case until the aforesaid appeals and any further review or appeal of the *Cahill* case to the United States Supreme Court is exhausted" are "stay[ed]." (Appendix to Petitioner's Reply Brief ("Reply App.") at A-2).[1] This statement, issued shortly

[1] Petitioners assume that Mr. Abrams made his argument in good faith; but the fact that he is unaware of the PSC's own position on the subject confirms the fact that he does not in this case represent the State of New York and its PSC. See note 9, *infra*.

after oral argument in the court below, should come as no surprise to anyone, because the very PSC orders on which respondents rely make plain (when read in context) that the PSC was merely suspending allowance of charitable contributions pending the outcome of this litigation, for the simple reason that no stay of the intermediate appellate court order annulling that practice had been sought.[2]

Although Cahill represents to this Court that he did not make the same argument below (Cahill 14-15 n.*), he in fact did so, albeit unsuccessfully. (*See* Transcript of Oral Argument, Reply App. A3-4). The Court of Appeals rejected Cahill's argument and proceeded to review this case on the merits, and petitioners urge this Court to do likewise.[3]

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[2] With respect to the particular utility companies involved in this case, the PSC's September 25, 1984 order, as respondent Abrams describes it, ordered the companies "to establish special accounts into which the utilities were directed to pay amounts equal to the charitable donations which were recovered under the now superseded rate case orders." (Abrams Br. 3). Such "deferrals" indicated no change in the PSC's substantive policy but rather were "necessary to insure that the mandate of the Court is complied with . . .." (Abrams App. A-3). As the PSC noted in the October 13, 1989 order to which respondents refer, "all court appeals have not been exhausted" and, "if the final outcome of *Cahill* supports an allowance, we can prescribe a method for recovery of the deferred amount." (Abrams App. A-7). Respondents likewise misrepresent the third PSC order, of July 6, 1990, in the RG&E case, from which they excerpt only meaningless tables (Abrams App. A-9 to A-19), omitting the Administrative Law Judge's Decision that was adopted by the PSC (Opinion No. 90-17 at 66). That Decision stated, at page 20, that charitable contributions were removed from the ratebase "pending resolution of the appeal from the Appellate Division's ruling in *Cahill* v. *PSC*. RG&E says that in the event the appeal succeeds, it would seek later recovery of the forecasted amounts. [The PSC's] staff apparently agrees, with the proviso that recovery should not exceed actual contribution amounts." It follows from this virtual escrow arrangement that, even if the PSC *had* changed its policy, or were to decide for some other reason to exclude charitable contributions from the ratebase in the future, petitioners would have a vital fiscal stake in the outcome of this case, and respondents' justiciability argument would still be indefensible.

[3] Seeking to brush aside the Court of Appeals' obvious conclusion that this case was not mooted by a fictional change in PSC policy, Cahill treats the decision below as a state court advisory opinion unreviewable by this Court. (Cahill Br. 14-15 & n.*). That characterization would surely surprise the court

Respondents' suggestion that this appeal may not provide the relief petitioners seek because, whatever its current policy, the PSC *might* some day change its mind (Abrams Br. 5-6; Cahill Br. 16-21) makes no sense. Without relief from this Court, petitioners stand to lose a great deal, both in terms of contribution expenses thus far deferred (see note 2, *supra*), and in terms of the disallowance of future contributions. And relief from this Court would not be rendered worthless by the mere prospect that the benefits to petitioners *might* be short-lived *if* a future PSC were to revert to its pre-1970 policy. For that is the sort of sheer speculation that would deprive this Court of jurisdiction in *every* case in which it was conceivable that the statute or rule at issue might, some day, be changed to a litigant's detriment by the legislative body that adopted it.[4] The controversy in this case is thus quite real and very

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below since it expressly noted that NYTel and RG&E were before it on an appeal "as of right." (A3). Indeed, the very case Cahill invokes to suggest that the court below might have rendered an advisory opinion makes plain that it did not do so, and could not have. For the case Cahill cites, again directly contrary to his representation in this Court, holds that the New York courts are no more free than federal courts to decide moot, abstract or hypothetical cases! *See Hearst Corp* v. *Clyne*, 431 N.Y.S.2d 400, 402 (Ct. of Appeals 1980) (*cited in* Cahill Br. at 15 n.*) ("It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle . . . forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions . . . .").

[4] If it were not enough that the factual premise of respondents' justiciability argument is a total fantasy, they have gotten the law wrong as well. Respondents' citation of cases like *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), and *Allen* v. *Wright*, 468 U.S. 737, *reh'g denied*, 468 U.S. 1250 (1984) (Abrams Br. 5-6; Cahill Br. 17-21), is completely inapposite. Those cases are about *standing*, and they simply refuse to accord standing to private *plaintiffs* who seek to overturn government policies on "speculative" theories that *if* those policies were overturned *other* private entities might be encouraged to act in ways beneficial to the plaintiffs. There is obviously no such problem here, where state-court *defendants* merely seek the removal of an erroneously interposed federal bar to their continued enjoyment of a long-standing state policy in their favor.

much alive, and the First Amendment and state action issues — issues that respondents evidently would prefer not to analyze closely — are fully justiciable and worthy of this Court's attention.

II. The State Action Issue, and the Appellate Court Conflict Thereon that Respondents Do Not Deny, Merit the Plenary Attention of This Court.

Respondents do not even attempt to deny that the court below brushed aside this Court's state action precedents and instead based its finding of state action on public employment/union dues cases that had no occasion to address the state action issue. But neither respondents nor the court below can elude this Court's square holding in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), that "[a]pproval by a state utility commission of . . . a request [to engage in routine business practices] from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.* at 357 (emphasis added). This is precisely what happened here. NYTel treated "as an operating expense" (A66) some of its non-political, non-religious charitable contributions and sought approval from the PSC for inclusion of that sum in the ratebase, so that NYTel might, in accord with federal tax and regulatory accounting principles, enjoy under state law the freedom to count such contributions as a business expense — a freedom that non-regulated businesses routinely enjoy. (A66-67).[5] The PSC, in 1970 and since, has merely *approved* the inclusion of charitable contributions in the ratebase; it has

[5] In an attempt to escape the force of *Jackson*, Cahill seeks to distinguish non-regulated companies from utilities by pointing out the fact that the latter are legal monopolies. (Cahill Br. 30-31 n.*). But that obvious fact was already taken into account in this Court's analysis in *Jackson*. *See* 419 U.S. at 357.

not "*ordered*" the utilities to make such contributions nor *required* them to include contributions in their rate requests.

The judgment below attributing that private practice to the state not only violates this Court's state action rulings, but also conflicts with two federal Courts of Appeals decisions that have held, in accord with *Jackson*, that mere regulatory acquiescence in a telephone company's business decision does *not* make a public service commission constitutionally accountable for any alleged First Amendment abridgement entailed by that private decision. Although Cahill appears to have overlooked them, those cases are discussed in the Petition at pp. 12-13.

III. The Radical First Amendment Right Pioneered by the Court Below Should Be Reviewed and Rejected by this Court.

Respondents do not even attempt to deny that the decision below flouts the well-settled rule that, where the government has instituted a neutral policy of general application completely unrelated to the suppression of speech, such as a rule requiring utility ratepayers to pay for all of the utility company's operating expenses, the government must be free to implement that policy uniformly — even over the sympathetic claim of an individual that the policy has an indirect impact on values protected by the First Amendment. (Pet. 16-17, 22-23).

Nor does either respondent contest the proposition that the decision below turns the First Amendment into a mechanism for demanding a compelling state interest to justify any utility business expense — whether a gift to the March of Dimes, a purchase from a non-union supplier, or an employee health plan providing controversial abortion services — that some ratepayer might perceive as having even an incidental expressive element or ideological tilt. (Pet. 21-25).

Moreover, respondents do not dispute the fact that the cases on which the court below relied, including *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977), establish only the principle — which Cahill concedes is not implicated here — that an individual may not be forced by the government to espouse, associate with, or be identified with views he or she finds objectionable. (Pet. 17-18; 20-21).

The only basis Cahill offers for reading the element of compulsory association out of *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), and its progeny is what he calls "Thomas Jefferson's 'ringing alarm,' invoked by this Court in *Abood*, that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.' " (Cahill Br. 33-34). But surely that admittedly moving but out-of-context excerpt from the passionate Establishment Clause debate,[6] included as dictum in a footnote in *Abood*, is an inadequate ground for reinterpreting an entire line of cases which had heretofore been understood as requiring an element of coerced association or public identification with the views of another. The principle announced below would require that, any time an individual would have to bear some indirect cost of another's conduct that might be deemed to have some expressive element — even if the individual would never be identified with that expression — the state *must* forbid the imposition of that incidental cost unless it can demonstrate a compelling state interest in not doing so. At the very least, this Court should set the matter for plenary briefing and argument before summarily recasting the entire *Abood* line of cases

[6] The passages originally quoted by this Court in *Abood*, 431 U.S. at 234-35 n.31, referred to or in turn quoted from Jefferson's Virginia state Bill for Religious Liberty, which was, according to the Court's source, "Madison's and Virginia's answer, in behalf of the people of that state, to the attempt to establish religion by opening the public treasury to the teachers of it." I. Brant, *James Madison: The Nationalist* 354-55 (1948).

and unleashing a new constitutional principle with such momentous implications.

The court below candidly admitted that its new First Amendment principle cannot readily distinguish between ratepayers and taxpayers and therefore casts doubt on the constitutionality of using government tax dollars or deductions to fund programs or speech that some citizens might find offensive. (A9) (Pet. 26). Yet Cahill insists that this threat is baseless and that the distinction is clear, relying solely on Justice Powell's concurring dictum in *Abood* that, unlike a "private association," the "Government is representative of the people." 431 U.S. at 259 n.13. (Cahill Br. 39-40).

As we have already explained (without rebuttal by respondents), this dictum alone is not an adequate distinction in the context of *this* case (Pet. 27-28). For just as the government gives individual and corporate taxpayers the right to deduct, and therefore to make their neighbors share the cost of, their charitable contributions, likewise the New York Legislature and its agency, the PSC, as representatives of the people, have given utility companies the right to include in their ratebase all reasonable operating expenses, including non-political, non-ideological charitable donations.[7] Surely the real reason

[7] Cahill asserts that the PSC allows utilities to include in their ratebases contributions to political and advocacy organizations. (Cahill Br. 2-3). Since Cahill has never put on any evidence of his own, nor challenged NYTel's evidence and affidavits (Pet. 7), he bases his accusations entirely on the annual report NYTel submits to the PSC (*see, e.g.*, JA 690-709) — which he has evidently misread. The listed donations to organizations such as NOW and NAACP go *not* to advocacy or other ideological activities, but to such traditional charitable activities as programs for battered women or abused and neglected inner-city children. One must also keep in mind that less than half of NYTel's total contributions listed in the report are passed on to ratepayers; most of the expense is borne by the shareholders. (Pet. 5). Moreover, Cahill cannot deny that both state law and NYTel's own policies forbid the recovery in rates of any political, lobbying, ideological or sectarian religious expenditures. (Pet. 4-5 & n.6) (JA 547-52). Ratepayers may object in PSC ratesetting proceedings to donations they perceive as transgressing this standard, and the PSC when

that government funding or tax deductions do not implicate the associational right recognized in *Abood* is that, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated." *United States* v. *Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989). Plainly, the nexus between utility ratepayers and utilities' charitable contributions is equally attenuated — no one will ever associate Cahill with NYTel's corporate philanthropy simply because he pays his phone bills. There is no way of distinguishing ratepayers from taxpayers under the decision below. At the very least, the question merits the plenary attention of this Court.

Respondents do not and cannot deny that the decision below threatens the policies of the FCC and the FERC (both of which deem charitable contributions to be reasonable operating expenses) (Pet. 2 n.2), as well as the utility policies of many state regulatory bodies — at least 18, even by Cahill's count[8] — that likewise allow inclusion of charitable contributions in the ratebase. Cahill obliquely dismisses the interests of these sovereign states with the observation that many of the decisions affirming their contribution policies "are by state public service commissions, not by courts." (Cahill Br. 7 n.*; 39). This remark reveals a fundamental misunderstanding of our form of government — policy choices about utility regulation are *supposed* to be made by the legislative and executive branches, not dictated by courts invoking spurious First Amendment arguments.

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so asked has disallowed non-complying utility contributions. Cahill, of course, never pursued this avenue of relief because Cahill's real complaint, as revealed by his own verified petition, is an objection on "personal grounds" to utility support for "all charities in general." (A63).

[8] Cahill's dispute over the policies of a few of the states enumerated in the Petition (Cahill Br. 6-7, n.*) is based on a debatable reading of the relevant cases and does nothing to diminish the fact that the rights of many states to establish their own regulatory policies would be threatened by the principles adopted below.

CONCLUSION

Even if Cahill were correct in saying that the decision below concretely injures "only" the petitioning utilities and the State of New York,[9] that — coupled with the violence the decision does to constitutional doctrine — would be sufficient reason for this Court to grant a writ. In *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court issued a writ of certiorari to the New York Court of Appeals when that tribunal extended this Court's First Amendment cases so as to restrict the legitimate scope of state commercial regulation and police power. In *Arcara* the Court of Appeals was reversed because, while "[p]urporting to apply" a test set forth by this Court, it "ignored a crucial distinction between the circumstances" of the government precedents and the case at hand. 478 U.S. at 701, 703. In stripping *Abood* of its emphasis on coerced association or identification with the expression of another — phenomena that are conceded by all to be lacking here — the court below

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[9] Contrary to Cahill's misunderstanding (Cahill Br. 12), respondent Robert Abrams does not purport to speak for the State of New York in opposing certiorari. Abrams himself states that in this case he acts as "*parens patriae*." (Abrams Br. 2). Abrams' attack on the constitutionality of his own state's policy confounded the Judges of the New York Court of Appeals, and Abrams' counsel spent nearly half his oral argument in the court below defending Abrams' role in this case. (Reply App. A4-5). Abrams' counsel explained that, although the Attorney General usually "acts as counsel to the state," here he was *attacking* the state as an exercise of his "common law responsibility to represent the citizens of the state and the citizens of the state are the ratepayers." (Reply App. A4-5). It is doubtful that Abrams' posture is sufficient to meet this Court's test for *parens patriae* standing in a federal court, where the mark of a quasi-sovereign interest is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Sons, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982). New York, of course, has already addressed the issue, through legislation and the policy judgment of its PSC, and it is precisely those sovereign acts of lawmaking that Abrams attacks.

Fortunately for Cahill, his status as a respondent here is secure, and this Court's jurisdiction to proceed to the merits is not in doubt.

has repeated the same error, and has escalated it. The same corrective steps by this Court are accordingly in order.

Respectfully submitted,

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October 10, 1990

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

STIPULATION
Index No. _____

In the Matter of the Application of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.,)
Petitioner,)
for a judgment pursuant to Article 78)
of the CPLR,)
)
—against—)
)
PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,)
Respondent.)

WHEREAS, this proceeding was commenced in the Supreme Court of the State of New York, County of Albany, by service of a notice of petition and verified petition on January 23, 1990,

WHEREAS, in two cases directly related to the issues presented in this proceeding, *Cahill v. Public Service Commission* and *Abrams v. Rochester Gas & Electric Corporation* (the "*Cahill* case"), two of the parties-respondent have perfected their appeals in the Court of Appeals of the State of New York; and

WHEREAS, the Notice of Petition served by Petitioner in this proceeding provided for a return date of May 18, 1990; and

WHEREAS, the parties believe that the outcome of the *Cahill* case is likely to have a substantial impact on the issues presented to the court for review in this proceeding; and

WHEREAS, in order to avoid potentially unnecessary and duplicative litigation, the parties hereto wish to stay all proceedings in this case until the aforesaid appeals and any further review or appeal of the *Cahill* case to the United States Supreme Court is exhausted;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties hereto that the parties request the postponement of the return date of this proceeding to December 7, 1990, consistent with their desire to await the outcome of the aforesaid appeals and reviews of the *Cahill* case in the Court of Appeals and the United States Supreme Court.

Dated: April 12, 1990

ELEANOR STEIN
Attorney for Respondent,
Public Service Commission
of the State of New York

Dated: April 15, 1990

JOHN D. MCMAHON
Attorney for Petitioner,
Consolidated Edison Company
of New York, Inc.

APPENDIX B

PARTIAL TRANSCRIPT OF ORAL ARGUMENT BEFORE THE COURT OF APPEALS OF THE STATE OF NEW YORK MARCH 29, 1990

* * * * *

RE [Richard Emery, Counsel for Petitioner Cahill]:
[The PSC policy] is a discrete, clear policy that was adopted in 1970, and which, by the way, the PSC is now apparently in the processes of abandoning because they're not here today. They are in fact acceding to the Third Department decision which is very clear and very to the point, that there is no such compelling state interest available.

COURT: Is there any question of mootness now at their being out of it?

RE: Well, I did not raise it in the brief; New York Telephone raises it in a footnote; I think there is a question of mootness as to these parties. These parties are here, operating under a policy which no longer directly applies to them. Their latest rate orders do not accede to the Third Department decision. There has not been a wholesale abandonment of the policy because the PSC is abandoning it as every rate decision comes up. There's an argument that we could go back to the Third Department, try and hold the PSC in contempt because they haven't done it across the board in the context of the Third Department's decision, but that aside — we're not doing that — that aside, these parties here are essentially arguing the PSC's case.

The PSC is not here. In some sense you could argue, I think, that these parties, New York Tel. and Rochester, are here in it saying that "you must order the PSC to go back to their old policy," that it's constitutionally necessitated. That's almost the burden on them if it's not a moot case. And of course there's no argument for that — there's no way this court would ever compel the PSC to adopt this policy, which is in essence I think the burden that they have to overcome here. So I think there is a question of mootness here with respect to these parties.

* * * * *

RG [Richard Golden, Assistant Attorney General, Counsel for Petitioner Robert Abrams, Attorney General of New York]:

May it please the court, the essence of this case is that the Public Service Commission coerced ratepayers into supporting the utilities' favorite charities. Every time the —

COURT: Doesn't the Attorney General represent the state agency?

RG: The Attorney General both represents state agencies as counsel to the state, and also —

COURT: Isn't there a conflict here, with the Attorney General representing the respondent-petitioners here when you're supposed to be upholding the constitutionality of a statute with the agency?

RG: The Public Service Commission has its own counsel and we do not represent them. In this case we represent the ratepayers of the utilities.

COURT: If there's an attack on the constitutionality aren't you supposed to be informed and aren't you supposed to come in and defend the constitutionality of a statute?

RG: You may recall, your Honor, that when this case was only concerned with the state action question, the Attorney General, even though he thought the —

COURT: It may not bother anybody else —

RG: We did not participate in that phase of the case, the Public Service Commission did not ask us to defend it, they have their own counsel, as I said, and they have never objected to our taking the position in this case that we have.

COURT: Well they're not even here.

RG: Well they never did before, and this the third level of review of this order. The Public Service Commission has never challenged our role.

COURT: Is it for them to raise the challenge, or is it a concern within your own responsibility or the responsibility of your office in terms of what Judge Titone is inquiring about in terms of defending constitutionality?

RG: The Attorney General has a common law responsibility to represent the citizens of the state, and the citizens of the state are the ratepayers. So it's entirely within the Attorney General's role to stand forward today in opposition to this unconstitutional exaction.

* * * * *

COURT: Mr. Clarke, could you help us with the mootness issue?

JC [John Clarke, Counsel for New York Telephone Company]:

Yes I can, I would refer you to *Cornelius* footnote 1 on that, your Honor; plus if you look at the — that's as to the law on this subject — and if you look at what the Public Service Commission has done, it has merely said that it is acceding to the mandate of the court. They can't flout the court's Appellate Division order here, but they have set up their structure so that they did not pull the rug out from under us on the appeal — counsel has represented that, Public Service Commission counsel has represented that to me, and if the court reverses the Appellate Division, then we go back to the situation we were in before. The Public Service Commission has not changed its policy, you have not seen one word saying that the Public Service Commission now believes that these are not reasonable business expenses. They still believe the same thing, they're merely acceding to the rule of law without a stay on the Appellate Division decision.

* * * * *

Supreme Court, U.S.
FILED
OCT 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY
AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

vs.

JOSEPH CAHILL
AND
ROBERT ABRAMS, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

SUPPLEMENTAL BRIEF

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BEST AVAILABLE COPY

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SUPPLEMENTAL BRIEF

Petitioners allege that respondents have misrepresented actions taken by the Public Service Commission. Petitioners' Reply at 1-3 and nn. 1-4. Respondent Abrams submits this supplemental brief pursuant to Supreme Court Rule 15.7[1] solely to respond to that allegation.

[1] Rule 15.7 permits submission of a supplemental brief while a petition for certiorari is pending to call to the Court's attention "... intervening matter not available at the time of the party's last filing." While this Rule does not envision the submission of a response to arguments on the merits raised in a Reply, respondent respectfully submits that a charge of misrepresentation constitutes new matter that necessarily could not have been addressed in a previous filing. A supplemental brief responding to such a contention is thus permitted by the Rule. It is particularly warranted when, as here, the matter in dispute implicates the Court's jurisdiction.

Petitioners contend that respondents have failed to disclose that the Public Service Commission's abandonment of the policy challenged in the courts below was prompted by its duty to comply with a lawful mandate of the Appellate Division that had not been stayed. Nothing in respondents' submissions, however, suggested that the Public Service Commission was not legally obligated to comply with, or that the Commission did not feel constrained by, the court's mandate. But petitioners ignore entirely the simple, and dispositive, fact that the Commission did not appeal the Appellate Division's order to the Court of Appeals and that it therefore necessarily is not before this Court. At least as far as this Court's jurisdiction is concerned, by that deliberate decision not to appeal, the Public Service Commission forfeited its opportunity for judicial review. It was that decision, more than the orders it subsequently issued, that constituted the "revisiting" and abandonment of its pass-along policy. The Commission's subsequent orders were simply a necessary consequence of its decision not to appeal a court order that affirmed a judgment annulling that policy. (A-22, A-27).[2]

Nor could any dicta contained in the Administrative Law Judge's recommended decision in the RG&E case, *see* Petitioners' Reply at 2 n.2, discussing the possibility of a restoration of the pass-along if the Appellate Division's order were reversed, or

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[2] Petitioners attribute to the Commission statements in its October 13, 1989 order, which involved the rates of Consolidated Edison Company. Petitioners' Reply at 2 n.2. In fact, these statements were characterizations by the Commission of positions taken by the utility and the Commission's staff. Thus, the Commission did not base its decision on the fact that "all court appeals have not been exhausted" and did not decide that "if the final outcome of *Cahill* supports an allowance, we can prescribe a method for recovery of the deferred amount." Petitioners' Reply at 2 n.2 (quoting Abrams App. A-7). Rather, the Commission rejected a joint proposal of the utility and the Commission's staff that the contributions be included in the rate base pending final resolution of *Cahill*, and simply "eliminat[ed] any recoveries for charitable contributions expense". Abrams App. at A-8. The Commission also eliminated any pass-along of charitable contributions when it ruled in the RG&E case on July 6, 1990. Abrams App. A-11, 13, 16, 19 (entries specifying "O" (zero) for "Donations" and "Contributions Passback").

a preamble in a stipulation adjourning a judicial challenge to the Consolidated Edison Company order, alter the essential fact that once the Commission chose to abandon its defense of the challenged policy, there could be no reversal in a court bound by Article III of the Constitution. *Diamond v. Charles*, 476 U.S. 54, 62-65 (1986).

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Respondents.

On Petition for a Writ of Certiorari
To the New York Court of Appeals

BRIEF OF UNITED WAY OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION

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October 5, 1990

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IN THE

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STATE OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari
To the New York Court of Appeals

BRIEF OF UNITED WAY OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION

United Way of America, with the consent of the parties, submits this brief amicus curiae in support of the petition in this case.

INTEREST OF THE AMICUS CURIAE

United Way of America is a national nonprofit charitable organization with nearly 1,300 member United Ways throughout the nation, including 53 in the State of New York. These member United Ways are the familiar vehicles for much of our country's charitable giving. Deriving their resources typically from annual community campaigns addressed to both individuals and companies, they use the resources thus collected to support

or contribute to the support of more than 40,000 health and welfare agencies, which in turn serve the needs of countless human beings.

The United Ways receive substantial charitable contributions from corporations, among them telephone companies, gas and electric companies, transportation companies and other utilities that provide citizens with necessary services. In 1989, corporate contributions to United Ways totaled $682 million, and of these the contributions from utility companies were $55.8 million. The petitioner New York Telephone Company contributed $2.1 million to United Ways in its service area, and United Ways in New York State received a total of $7.5 million from utilities. These contributions from utilities and their use to meet human welfare needs are jeopardized by the decision of the New York Court of Appeals.

ARGUMENT

Introduction and Summary

The decision below, that the First Amendment effectively prevents a regulated privately owned utility from including reasonable charitable contributions in the costs it can recover from its customers, raises substantial constitutional issues of large importance. By this brief the amicus United Way of America seeks to underscore the substantiality of the issues and their importance to the charitable activities of the 1,300 United Ways. If the decision of the New York Court of Appeals is allowed to stand without review by this Court, the 53 New York State United Ways and the health and welfare agencies they support stand immediately to be deprived of important corporate contributions, and contributions from utilities to United Ways in other states will be at risk.

The constitutional issues are indeed substantial. The court of appeals held that the decision of the petitioner New York Telephone Company to contribute to local charities from telephone user revenues is an action of the

State of New York because the New York Public Service Commission, exercising its regulatory authority over telephone rates, declined to veto the decision. That holding cannot be reconciled with this Court's decisions as to what is and what is not "state action" subject to constitutional strictures. The court of appeals held further that the respondent Cahill has a constitutional right derived from the First Amendment to prevent the petitioner telephone company from contributing to local charities because he disapproves of some of the recipient charities. That holding draws no support from and is at odds with this Court's decisions that the First Amendment protects an involuntary member of a state-supported organization from being associated with causes of the organization that are not his or her causes.

In combination, the court of appeals' two erroneous holdings threaten severe consequences for the amicus, its member United Ways and the agencies they support, and ultimately the people who benefit from the services of those agencies.

Reasons for Granting the Writ

1. A government-regulated but privately owned company is not, without more, the government or the state for the purposes of asserting constitutional rights against it. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 553 (1980) (Blackmun, J., dissenting); *Carlin Communication, Inc.* v. *Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357 (11th Cir. 1986). *See also Shelly* v. *Kraemer*, 334 U.S. 1, 13 (1948); *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976). Neither the monopoly status of a privately owned utility, nor the fact that it provides an essential public service, nor its subjection to detailed regulation in the public interest makes it the government for purposes of constitutional guarantees. So this Court ruled in the *Jackson* case. 419 U.S. at 350-54.

In that case, the Court held that actions of private entities are "state action" only when there is a "sufficiently

close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. It found no such nexus in the case at hand. There is no such nexus here. The Court noted in *Jackson* that it is in the nature of government regulation that a utility often has to seek "approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body." *Id.* at 357. The Court said that "[a]pproval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.* The rule thus stated could scarcely be clearer. In *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982), the Court put the same thought in slightly different terms. It said that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

There has been no exercise of coercive power or even significant encouragement here. The New York Public Service Commission "has not put its own weight on the side of" allowing recovery of charitable contributions from user revenues "by ordering it." The policy of the commission is merely to permit a utility that so chooses to initiate a normal business practice that a less regulated business would be free to institute without approval. The Public Service Commission neither compels nor encourages utilities to contribute to charities. The Public Service Commission plays no role in (1) a utility's decision whether to make any charitable contributions, (2) its determination of which charities to support, or (3) the amount that a particular recipient may receive (subject to the Commission's limit on total contributions). On those issues, the utility deals solely and directly with

the charities it supports. The relationship between a charity such as a member United Way and a publicly regulated but privately owned utility is thus no different from the relationship between a United Way and any other private corporate donor. Dissenting from his court's state action decision, Judge Titone aptly explained below that the commission "has done no more than merely refuse to interfere with what is essentially a private decision." (Pet. App. A42.)

New York Telephone's decision to contribute to organizations such as the United Ways in its service area, which provide such human care services as drug rehabilitation programs, home health care for the aged and handicapped, day-care, counseling and recreational programs to its employees, ratepayers, and others, is no different from the decisions made by thousands of other private businesses to further the welfare of the communities in which they operate. And New York Telephone's civic responsibility to the communities it serves and interest in their welfare is no less.

Many (though not all) state regulatory authorities (see Pet. 2-3 & nn.1, 3) have recognized that charitable contributions are expenditures that benefit utilities, their employees, ratepayers and the communities in which they do business and have therefore permitted such contributions to be included in the costs a utility is allowed to recover from its customers. *See, e.g., United Transit Co.* v. *Nunes*, 99 R.I. 501, 513-14, 209 A.2d 215, 222 (1965); *Southwestern Bell Tel. Co.* v. *State Corp. Comm'n*, 192 Kan. 39, 73, 386 P.2d 515, 544-45 (1963); *Application of Diamond State Tel. Co.*, 51 Del. 525, 536, 149 A.2d 324, 331 (1959); *Board of Supervisors* v. *Virginia Elec. & Power Co.*, 196 Va. 1102, 1118, 87 S.E.2d 139, 149 (1955). Federal authorities regulating telecommunications and natural gas utilities have similarly determined that charitable contributions are a legitimate business expense that may be included in the cost of

service for which a utility company's ratepayers are charged. In *In re Rules to Prescribe Components of Rate Base and Net Income*, 3 F.C.C. Rec. 269, 280 (1987) the Federal Communications Commission said that "reasonable charitable contributions are very much an obligation of [a] business enterprise to the community it serves and upon which it is dependent for its revenues" and are "part of the cost of doing business." The Federal Power Commission, predecessor to the present Federal Energy Regulatory Commission, ruled similarly. "Reasonable charitable contributions are very much an obligation of a business enterprise" and "are properly a cost of service." *In re El Paso Natural Gas Co.*, 46 F.P.C. 454, 467 (1971).

It has not heretofore been suggested that the cases just sampled turned the business decisions of utilities to contribute to meet human needs in their communities into decisions of state or federal government. However, for reasons that are altogether obscure, the New York Court of Appeals, dealing with just such a case—a case involving noncoerced conduct of a utility, to which this Court's decision in *Jackson* is squarely relevant—turned to the Court's inapposite decision in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), for guidance on whether there was state action in this case. (Pet. App. A31.) *Abood* is not even a "state action" case, let alone a case involving a utility and a regulatory commission declining to exercise a veto power. *Abood* concerned public employees and their union. Nonunion employees filed an action objecting to uses by the union of their service fees, which they were required to pay by an agency shop agreement between the union and the Detroit Board of Education, a government entity. Because the fees thus were required by an agreement between the union of government employees and the government employer, and the requirement was enforced by the employer, state involvement was obvious. As a result, it was unnecessary for the Court to address the state action issue. Certainly

there is nothing in the Court's opinion in *Abood* that suggests any modification of the clear rule of *Jackson*.

In short, the Public Service Commission's decision to allow but not require private utilities to recover charitable contributions from their rates merely permits those companies to engage in conduct clearly permissible for businesses not subject to rate regulation. Accordingly, the Public Service Commission's policy does not transform the private utilities' conduct into government action.

2. The court of appeals analogized the respondent Cahill to the Jehovah's Witness children who, this Court held in *West Virginia Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943), could not be compelled to affirm what they did not believe; and to the Jehovah's Witnesses whom this Court in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), confirmed in their view that they could not be made to flaunt on their automobile a motto repugnant to their beliefs. (Pet. App. A3-A4.) The analogy is farfetched. Much more nearly is Mr. Cahill analogous to a taxpayer, who even though a Jehovah's Witness can be made to support by his taxes the cost of flying the flag over the Capitol and or of inscribing a motto on New Hampshire license plates, however antithetical the symbol of the flying flag or the motto may be to his profoundest tenets.

There are, to be sure, cases that might be thought closer in point—the cases that concern state compulsion to support a union, as in *Abood*, or, as in *Keller* v. *State Bar of California*, 110 S. Ct. 2228 (1990), the state's requirement that all California lawyers pay dues to their state bar. But what the Court has condemned in those cases as violative of the First Amendment is the coerced association of the dues payer with ideas or opinions advanced with the help of his dues that he finds unacceptable. No one would sensibly associate Mr. Cahill with New York Telephone's ideas or opinions just be-

cause he uses its services and pays his bills. In his capacity as customer he is much more nearly the taxpayer than he is the dues-paying member. Thus, even if the state action hurdle were mounted, there would be no First Amendment violation in this case.

3. There would be no such violation even if the connection between charitable contributions and any of the rights of expression and association guaranteed by the First Amendment were less attenuated than it is. Both New York law and the Public Service Commission's accounting regulations preclude recovery from user charges of any political or ideological expenditures. *Consolidated Edison*, 447 U.S. at 550. (Blackmun, J., dissenting). *See* New York Pub. Serv. Law § 114-a. Charitable contributions are made to assuage human needs; they are not within the cited prohibition. The court below acknowledged some of the benefits to utilities of making charitable contributions but denigrated them as resulting only in "gossamer civic goodwill" and as "peripheral to the *service* interests of the ratepayers." (Pet. App. A9 (emphasis in original).)

To the contrary, charitable contributions by a utility are not calculated merely to generate "beneficial corporate public relations." *Id.* Rather, they are investments in local communities from which the utility, its employees, shareholders, and ratepayers receive both tangible and intangible benefits. Contributions to member United Ways support day-care programs and counseling services, which directly benefit, among others, the employees of the utility. United Ways also support job training and placement programs, which not only improve the work force in the community, but may, by making ratepayers more self-sufficient, help insure that utility bills are paid. Local fuel funds serve a similar purpose. In addition, charitable contributions to United Ways go to fund community mental health programs, cancer screening programs, public health and fitness education programs, and many other health services, which help re-

duce a utility's direct costs of providing medical care to its own employees. Furthermore, United Ways support programs providing community youth services, and address problems of homelessness, hunger, unemployment and alcoholism, which, by helping to reduce vandalism and urban blight, not only reduce the utility's maintenance and repair expenses, but also help make the community a more attractive place to live and work. This in turn improves the utility's ability to recruit and retain highly qualified personnel.

All of this is far from "gossamer." It is good business. Federal agencies, as we have seen, have characterized contributions to causes such as these as "an obligation of a business enterprise." At the very least, they are, as the New York Public Service Commission has recognized, a reasonable cost of doing business that can be recovered in rates. The commission's recognition of that fact and consequent declination to veto New York Telephone's business decision does not make that decision attributable to the state, and, if it did, there would nevertheless be no First Amendment violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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